United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,179

United States Court of Appeals
For the
District of Columbia Circuit
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GERICO INVESTMENT COMPANY,

Appellant,

v.

965

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

PUBLIC SERVICE TELEVISION, INC.,

Intervenor.

APPEAL FROM THE FEDERAL COMMUNICATIONS COMMISSION

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JOINT APPENDIX

[From Case No. 13,718 - WKAT, Inc. v. F.C.C.]

4436 Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

FCC 57 - 138

39956

In re Applications of

WKAT, INC. Miami Beach, Florida	)	DOCKET NO. 9321 Filed No. BPCT-399
L. B. WILSON, INC. Miami, Florida	)	DOCKET NO. 10825 File No. BPCT-1645
NORTH DADE VIDEO, INC. Miami, Florida	)	DOCKET NO. 10826 File No. BPCT-1685
PUBLIC SERVICE TELEVISION, INC. Miami, Florida	)	DOCKET NO. 10827 File No. BPCT-1792
For Television Construction Permits (Channel 10)	)	

* * * *

DECISION

* * * *

4540 ACCORDINGLY, IT IS ORDERED, This 7th day of February, 1957 that the applications of WKAT, Inc., L. B. Wilson, Inc. and North Dade Video, Inc., for a permit to construct a new commercial television station to operate on Channel 10 in Miami, Florida ARE DENIED and that the application of Public Service Television, Inc., for such permit is GRANTED, subject to the conditions that its antenna structure will be painted and lighted in accordance with Part 17 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION*

/s/ Mary Jane Morris
Secretary

Released: February 8, 1957

*See attached dissenting statement of Commissioner Hyde.

[Seal - Signed by Above Mailed by Feb. 8, 1957 - EBM - Mail & Files]

[From Case No. 14,170 - WKAT, Inc. v. F.C.C.]

7892 [F.C.C. Seal - March 11, 1957]

PETITION FOR RECONSIDERATION, REHEARING AND REQUEST FOR STAY OF CONSTRUCTION

Comes now Gerico Investment Company, licensee of television station WITV, Channel 17, Fort Lauderdale, Florida, and submits its Petition for Reconsideration, Rehearing and Request for Stay of Construction in the above-entitled proceeding. In support thereof, it is respectfully stated as follows:

Nature and Background of Proceeding

1. On April 14, 1952, the Commission issued its Sixth Report and Order creating a fixed Table of Assignments and allocating television facilities to various states and communities on an "intermixed" basis. Although numerous proposals were advanced by parties to the proceedings advocating assignment of as many as five VHF channels to Miami, the Commission assigned but three commercial VHF channels to Miami. Although proposals were advanced for the assignment of VHF channels to Fort Lauderdale, Florida, some 25 miles north of Miami, no such channels were assigned, and, instead, Fort Lauderdale was assigned two

7893 UHF channels.

2. Television Station WTVJ was then in operation on channel 4, Miami. Thereafter, on June 2, 1952, Gerico Investment Company, a corporation whose stockholders are business, civic and social leaders in Fort Lauderdale, Florida, filed its application for a construction permit for Channel 17, one of the channels assigned to Fort Lauderdale. In its original application, Gerico specified an antenna site West of the City of Fort Lauderdale, in the vicinity of Davie Airport, a then inactive airfield. As shown by the said application (BPCT-994) Gerico would not, under that proposal, have provided better than a Grade B signal to Miami.

3. At the same time, applications had been filed for each of the additional commercial VHF channels available in Miami. As shown by

the said applications, the antenna sites selected were closely adjacent to the City of Miami (pursuant to the Commission's announced objective that antennas be situated as close as possible to the center of the principal city to be served) and none of the proposed stations, at that time, would have provided better than a Grade B signal to Fort Lauderdale.

4. However, in the fall of 1952, the U. S. Marine Corps reactivated its base at Davie Field, and the tower proposed by Gerico became objectionable under then existing standards relating to hazards to air navigation. At the same time, proceedings were held by the Regional Air Space Subcommittee (Atlanta) looking toward establishment of an antenna farm area in the Miami vicinity in order to accommodate all demands for tower construction in an area in which air traffic is extremely congested and in which there are no natural obstructions to shield high structures.

5. In order to satisfy the conflicting demands of Miami and Fort Lauderdale interests, and reduce the overall hazard to air navigation which would be created by the erection of numerous tall structures in the area, the Air Space Subcommittee recommended, by its letter of
7894 February 17, 1953, the creation of an antenna farm North of Miami and South of Fort Lauderdale, on which would be located the antenna supporting structures for both the Miami and Fort Lauderdale stations. The area chosen, however, was, in actuality, closer to Fort Lauderdale than to Miami.

6. Thereafter, Gerico amended its application for a construction permit to specify an antenna site situated within the newly designated antenna farm. The existing and proposed stations for the Miami area, then or at a later date, did the same. The significance of this event, however, lies in the fact that thereafter no difference, whatever, in coverage existed or could exist between Miami and Fort Lauderdale stations, for each was permitted to serve the area from the same location and the Miami stations were able to provide as good

a signal to Fort Lauderdale (better, in fact) as the Fort Lauderdale stations could provide a signal to Miami. It thereafter became impossible for a Fort Lauderdale station to deliver a market of its own for advertisers or networks and the fortunes of television in Fort Lauderdale became inextricably tied to the fortunes of television in Miami.

7. At the same time, the Commission's Rules and Regulations prohibited amendment of the Table of Assignments by deletion or change for a period of one year from the date of the issuance of the Sixth Report and Order and the promulgation of Section 3.606 of the Rules. Within one year from the date of issuance of the Sixth Report and Order, all of the commercial VHF channels available in the Miami area were the subject of applications.

8. Gerico received its construction permit on July 31, 1952, and thereafter contrcuted and placed in operation, on November 23, 1953, its television station on Channel 17, Fort Lauderdale. Although it was originally authorized to operate with an RCA 10 kw transmitter
7895 and 182 visual power, Gerico was unable to obtain delivery of the 10 kw transmitter and operated for a period of time with a temporary 1 kw transmitter. Subsequently, additional authorizations for increases in power and the use of a directional antenna system, giving optimum coverage in a north-south direction over the centers of population along the Florida coast, were received from the Commission. Gerico is presently authorized and operates with 465 kw ERP. On January 15, 1957, the Commission granted Gerico's application for license (BLCT-513).

9. In the meantime, it had become apparent to Gerico and to Storer Broadcasting Company, which acquired the physical plant of WFTL-TV, Channel 23, Fort Lauderdale, and secured approval of the Commission to relocate the said channel in Miami (Storer commenced operations on Channel 23 in December of 1954), that the future of UHF telecasting in the Miami area was extremely uncertain and that

the advent of operation of the two remaining commercial VHF channels in Miami would eliminate the two presently operating UHF stations, to the substantial detriment not only of the permittees, but of the public, itself. Accordingly, on April 14, 1955, Gerico and Storer filed a petition with the Commission requesting that Miami be de-intermixed on a UHF basis, in order to prevent loss of service by the public. Subsequently, the said petition was amended on May 4, 1955, to reflect the request by the petitioners that de-intermixture be accomplished on a partial basis, only, and that WTVJ, the pre-freeze VHG station be permitted to continue operation on Channel 4. At that time, the Commission had not acted, finally, on any of the applications for VHF Channels 7 and 10 then pending before it. In addition, Gerico and Storer pointed out that partial de-intermixture of the Miami area would allow the assignment of additional VHF stations to five Florida and Georgia markets, presently frozen in their allocations by reason of the VHF assignments in Miami.

7896 10. At the same time, Gerico and Storer requested intervention in the Channel 7 and Channel 10 proceedings in order to present these matters in an appropriate context and further requested that the Commission stay its proceedings in the said cases pending resolution of the de-intermixture proposals. No formal action was taken by the Commission until October 20, 1955, when the Commission dismissed the requests for stay. Thereafter, on November 10, 1955, the Commission "denied" the de-intermixture petitions, stating that it would consider such proposals in the general rulemaking proceeding that date instituted in Docket 11532, and, further, that its decision was without prejudice to its ultimate determination, if required, that de-intermixture in the Miami area required postponement or denial of the applications for the VHF channels then under consideration.

11. Petitions for reconsideration were filed by Gerico and Storer relating to the Commission's decisions of October 20 and

November 10. Subsequently, on January 20, 1956, the Commission simultaneously denied Gerico's Petition for Reconsideration and granted a construction permit to Biscayne Television, Inc., in the Channel 7 proceedings. Appeals from the Commission's Orders were taken by Gerico and Storer.

12. In its Order designating Docket 11532, the Commission specifically prohibited the filing of comments related to a specific market and required, instead, submission of comments relating to the over-all television allocation problems. On December 15, 1955 and February 8, 1956, Gerico filed Comments and Reply Comments in this proceeding.

13. Thereafter, on June 26, 1956, the Commission terminated the proceedings in Docket 11532, and simultaneously instituted certain proceedings which, in the words of the Commission, were designed to improve the competitive situation among stations in selective markets.
7897 At the same time, it invited comments to a proposal to shift all or substantially all of television broadcasting to the UHF spectrum. It also set up an industry coordinating committee to conduct further studies into the allocations problem, and specifically stated that it would thereafter consider not only the UHF proposal but any proposals, including the use of reduced mileage separations, directional antennas and the like, in order to achieve more efficient use of the VHF spectrum, as a possible solution to the allocations difficulties.

14. With specific reference to the Miami situation, the Commission initiated proceedings looking toward the possible assignment of Channel 6 to Miami, and stated that this proposal was "more meritorious than deletion of two or all VHF channels."

15. Gerico submitted comments in the further proceedings looking toward the use of UHF as the medium for television broadcasting, and in the Miami Channel 6 proceedings.

16. On January 17, 1957, the United States Court of Appeals denied Gerico's appeal from the Channel 7 proceeding. The specific situation in Miami, together with the overall problem of television

allocations was, however, by then under active consideration by the Commission.

17. On February 8, 1957, however, the Commission announced its final decision in the Channel 10 proceeding, granting a construction permit to a subsidiary corporation of National Airlines. No restrictions were imposed by the Commission on the construction of the proposed station; nor, did the Commission take occasion in its decision either to refer to the then pending proceedings looking toward a solution of the critical UHF-VHF problem in the Miami area or to the effect that its grant would have upon existing television services in the Miami area.

7898 The Necessity for a Stay of Construction

18. Independent of any question of the appropriateness of the Commission's grant of a construction permit in the Channel 10 proceeding, it should be apparent that the Commission has the affirmative duty to postpone construction of the instant facility pending resolution of the allocations proceedings now under consideration. Common justice requires no more.

19. At the present time, there are four commercial television services available to the viewing public in Miami and Fort Lauderdale, plus the benefit of the operation of a non-commercial educational station in Miami. Two of these services are VHF, two are UHF. They are: WTVJ, Channel 4, Miami; WCKT, Channel 7, Miami; WGBS-TV, Channel 23, Miami; and WITV, Channel 17, Fort Lauderdale. WTVJ is affiliated with the CBS network; WCKT with NBC, and WITV with ABC. WGBS-TV is, at present, operating independent of a network affiliation. Although, as will be shown later, some ABC programs are being carried by WTVJ and WCKT on a delayed, second choice basis, there is, nevertheless, available to all of the networks the services of full-time, competent and viewable (in terms of the numbers of UHF sets in the hands of the public) television stations for the offering of network television programs to the general public. In fact, all of

the television programs of all three networks which are of any commercial significance whatever are presently being seen in the Miami-Fort Lauderdale area.

20. In addition to the network programs, the Miami-Fort Lauderdale public also enjoys the independent programming of WGBS-TV and the local and local live programming of both WGBS-TV and WITV, together with the local and local live programming of WCKT and WTVJ. In a word, the Miami-Fort Lauderdale area receives a full complement of both network and local programming from four professional and fully competent stations.

7899 21. It is currently estimated that 91.6 per cent of all of the television homes in Dade (Miami) and Broward (Fort Lauderdale) Counties are capable of receiving UHF television signals.[1/] That is, there are well in excess of 300,000 television homes in which an expenditure of $50.00 or more has been made for the purpose of enabling the viewers to receive UHF signals, either in terms of the additional cost of all-channel sets, or in UHF tuning strips, plus the cost of outside antenna installations. In hard, cold, dollars and cents figures, the general public in the Miami-Fort Lauderdale area has invested more than $10,000,000 in equipment solely for the purpose of receiving UHF television signals, and in excess of the cost (perhaps billions of dollars) of receiving television, generally. It need not be pointed out that the public did not make this investment at the risk of being deprived of service because of circumstances beyond the control of the individual television stations (but incidentally, within the control of the Federal Communications Commission), but upon reliance of the fact of existing services in the Miami-Fort Lauderdale area, services which were assigned and approved by the Commission. It would obviously be unfair and fantastically unrealistic to ascribe to the public in this area knowledge that the competitive

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1/ Source: Florida Power & Light Co., Miami Chamber of Commerce, Radio-Television Technicians Guild.

differences between UHF and VHF rendered their investments insecure from the moment that they were made and to assume that overwhelming majority of the viewers in the area were gambling upon the future success of UHF telecasting.

22. At the same, Gerico, in order to bring a local television service fo Fort Lauderdale, and to compete with its unwelcome neighbors from the south in Miami, invested a million dollars in its physical plant. It did so because it recognized that it was required to compete, like it or not, with all of the stations in Miami, and because it was determined to compete, if so required, to the full extent of its ability and resources. As previously noted, Gerico has improved its facilities, consistently, until it is now operating with more than
7900 500,000 watts visual power in the direction of the major lobes of its pattern, north and south along the coast in its service area. By any engineering standard yet devised, WITV offers close-in coverage superior to anything in the area. At the same time, Gerico has invested in seven live camera chains and the most complete, adaptable and reliable remote equipment of any station in the area, as evidenced by the current demand upon WITV to provide all of the ABC originations in the Miami-Fort Lauderdale area, and the fact that it has twice been called upon by NBC to provide the local originations for "Wide, Wide World."

23. WITV commenced operations on November 23, 1953. During the first two years of its operations, it lost in excess of $250,000. During its third year of operation, and from November of 1956, to date, it has managed to recoup approximately $78,000, of its losses and it continues to show a minimum profit at the present time. However, WITV's revenues have declined substantially since the commencement of operation by Channel 7 in July, 1956.

24. Notwithstanding the high rate of conversions in the area and the consistently high rating which WITV has attained in what is now considered by rating bureaus to be a "three" station market, and notwithstanding the fact that WITV is classified as a "primary" affiliate

of the ABC television network, the following programs of the ABC network are still being carried by WTVJ, Channel 4, on a delayed, second-choice basis: "Disneyland", "Ford Theater", "Ozzie and Harriet", "Navy Log", "Rin Tin Tin", "The Lone Ranger", "The Dupont Cavalcade", and "Bold Journey". In addition, "Wyatt Earp" is being carried by WCKT, Channel 7. The discrimination against WITV has been "explained" by ABC as being the result of the fact that "agency" produced programs are placed by ABC at the option of the advertising agency involved, and that selection of a VHF or UHF outlet, regardless of network affiliation, is given to the agency
7901 as a matter of choice.

25. Similarly, although the standard network affiliation agreement is of two years' duration, and although WITV has been the basic ABC affiliate for the Miami-Fort Lauderdale area since 1954, ABC has never given to WITV more than a 90-day cancellation agreement, patently in contemplation of the day on which a third VHF station would come into existence in the Miami area. Parenthetically, one might also point to the experience of Storer in the same area. At the time it commenced operations, Storer was the so-called basic affiliate of the NBC network; however, Storer's network agreement contained the same 90-day cancellation provisions as did WITV's and Storer immediately lost its NBC affiliation upon the advent of service by WCKT, Channel 7.

26. Approximately 20 per cent of WITV's gross revenues come from network and national advertising; of the remaining 80 per cent, which is local in origin, 60 per cent is sold on the basis of "adjacencies" to desirable network programs. By aggressive selling and aggressive selling and aggressive programming, WITV has managed to compete, not only with two VHF and one UHF station in its area, but with its <u>own network</u> which has permitted the highest rates, most lucrative ABC programs to be carried by other stations. Typical of the "UHF infection" which has beset WITV is the story of the program "Telephone Time" currently being carried by CBS. This program

will switch from CBS to ABC in April of 1957. It is sponsored, locally, by the local telephone companies, affiliates of the Bell System, the general sponsor. "Telephone Time", however, has not been ordered for WITV, but will be carried by WTVJ. ABC has explained to WITV that the telephone company has been granted a "local" option in the placement of this program and that it desires a VHF outlet, rather than UHF for the presentation of the program. This, be it borne in mind, in face of the substantial business which has been placed by WITV with the local telephone company for line facilities, not only for its network facilities, but for numerous remote broadcasts.

7902 27. By any standard, WITV is presently in an extremely precarious position. For the first time since 1953, VHF only television sets are appearing in substantial numbers in dealers stores in the area and the favorable conversion ratio is in danger of being reverse Furthermore, with the availability of the two leading networks on VHF channels and the most desirable programs of the third network being carried by the VHF stations, incentive for the public to replace obsolescent UHF receivers or faulty tuning devices has substantially declined. Notwithstanding these problems, WITV has continued to expend its best efforts in providing a first class television service in its community and has managed, by reason of aggressive selling and pure determination, to keep its station in operation on a minimum profit basis. Barring a change in the competitive situation, WITV believes that it can continue to exist and provide a needed service in its area at least until the Commission decides which way to jump in its allocations proceedings concerning the Miami area.

28. These allocations questions, however, are substantially in doubt and the final outcome cannot be predicted at this time. Gerico has pointed out, in its comments filed in the Channel 6 proceeding, that Channel 6 cannot be used in the Miami-Fort Lauderdale area, except on a reduced mileage separation basis and has proposed that the standards be relaxed so as to permit the operation of Channel 6 from

the antenna farm area and has further proposed that the Commission impose a requirement on any prospective user of the Channel that, by directionalizing or other means, protection be afforded to the existing operations which might otherwise suffer some interference.

29. At the same time, the Commission has now decided to de-intermix certain markets where existing VHF stations are in operation. Thus, the Commission may well decide, in connection with the Channel 6 proceeding, that the addition of Channel 6 is not "more meritori-
7903 ous" than the deletion of one or more VHF channels, as was first assumed. In any event, the Commission has specifically recognized, by initiating the rule-making proceedings relating to the Maimi-Fort Lauderdale area, that the situation is critical and needs remedial action.

30. Now, however, the Commission has precipitiously authorized operation of a third VHF channel in Miami without regard for the effect its action will have on the already critical situation in this market. It is a foregone conclusion that WITV will lose its ABC affiliation as soon as Channel 10 commences operation; ABC has publicly announced, in the trade press, that it soon expects to have a "competitive" outlet in Miami. WITV will be out of business when the third VHF channel goes on the air in Miami and it does not have the resources to continue a loss operation. Indeed, in the light of its experience with the "UHF infection" WITV can state that it would not make any difference to the future of television in the Miami-Fort Lauderdale area whether it stayed on the air and lost $50,000 per month or not, since there would be no prospect, whatever, of ever achieving competitive status in the market. On the other hand, if it can maintain its present position and the competitive situation remains unchanged, WITV believes that it can ultimately convince the network and advertisers, alike, that it can compete on a favorable basis with the existing stations in the market, both VHF and UHF. For what WITV faces, as does every UHF operator, is a combination of circumstances, both technical and economic, not the least of which is the

prejudiced and unrealistic Madison Avenue attitude toward UHF as an advertising medium.

31. From the beginning, WITV has attempted to do what the Commission so devoutly, but perhaps naively wished. It has made UHF television work in an intermixed market against staggering obstacles. It has competed against a pre-freeze VHF station for more than three years and against two VHF stations for eight months. And, it is willing to continue to compete until the issue is resolved. It cannot continue, however, in the face of this final obstacle imposed by the Commission.

7904 32. The commencement of service by Channel 10 will immediately cause the public to lose an existing service, through elimination of WITV. It may be expected, also, that WGBS-TV, the Storer station, will likewise discontinue operation, as it stated in its Petitions for rule-making. In this connection, it is noted that the press in Miami has reported that the winning applicant in the Channel 10 proceeding is presently negotiating with Storer to acquire Storer's tower and studio facilities. It may therefore be said that the Commission's decision in permitting operation of a third VHF channel in Miami, will lead to the loss by the public of two presently existing services. The result? Instead of having a choice of four commercial services, the public will have but three. Instead of having four local and local live outlets, it will have but three. Instead of having useful and valuable UHF sets and equipment , the public will have on its hands more than $10,000,000 worth of obsolete and useless junk, as though electricity had suddenly gone out of style.

33. Not only will the general public in the Miami-Fort Lauderdale area lose service as a result of the Commission's decision, but Fort Lauderdale area lose its only local television station, within the meaning of the second priority in the Sixth Report and Order. Although Fort Lauderdale has never had the opportunity to have a VHF station, it has nevertheless been subject to the vacilations of the VHF

competitive situation in Miami. This situation can never be corrected under existing allocations and will never be corrected if the Commission's allocations in Miami are frozen in their present posture.

34. Fort Lauderdale is the principal city of Broward County, Florida. At the time when the Commission issued its Sixth Report and Order, assigning two UHF channels to the use of Fort Lauderdale,
7905 the last officially reported U. S. Census data indicated that in 1950 Broward County had a population of 83,933, and the city of Fort Lauderdale, a population of 36,328. By April 7, 1955, at which time the United States Department of Commerce, Bureau of the Census, compiled a special census of Broward County, the county population had risen to 159,052, and the city population to 62,906, increases of 89.5 and 73.2 percent, respectively. By July 1, 1956, according to the annual population estimates published by the University of Florida, College of Business Administration, Broward County was credited with a total population of 205,100. In addition, many thousands of persons visit Fort Lauderdale each year during the resort season.

35. In 1950, Miami, which is the principal city of Dade County, had a population of 249,276, and Dade County had a total population of 495,084. By October 27, 1955, the date of the U. S. Special Census for Dade County, Miami's population had risen to 259,035, an increase of 3.9 percent. Total population for Dade County on the same date was 703,777, or an increase of 42.2 percent. The University of Florida population estimate for Dade County as of July 1, 1956, was 757,700. Examination of the increases in population in areas adjacent to Miami, including Hialeah and North Miami City, by census tract, indicates that the principal growth in Dade County has been to the north and west of Miami proper.

36. According to the 1948 U. S. Census of Business, there were 1,330 retail establishments in Broward County, of which 670 were situated in Fort Lauderdale. Total retail sales for the county in 1948 were $94,336,000 and for Fort Lauderdale, $59,921,000.

According to the 1954 Census of Business, the total number of retail establishments in Broward County had risen to 2,227, with annual retail sales of $225,165,000. Of these, 1,167 establishments were located in Fort Lauderdale, with retail sales of $133,122,000.

7906 Likewise, in 1954, Fort Lauderdale had 128 wholesale establishments, of which 112 were merchant wholesalers with sales of $39,-328,000, and 16 were wholesalers of other operating types with sales of $18,679,000. This compares with a total of 76 such establishments for the entire county in 1948. In addition, in 1954, there were 637 establishments in Fort Lauderdale engaged in selected services such as personal and business services, automotive repair service, amusement and recreation, and the operation of hotels, motels, and tourist courts, with total receipts of $18,461,000.

37. Fort Lauderdale is a flourishing independent community with its own locally elected officials and a full complement of religious, social, civic, cultural, and charitable organizations. Since 1950, growth in the area has been phenomenal. Fort Lauderdale has grown almost 25 times as fast as Miami, and Broward County, more than twice as fast as Dade County.

38. It seems incredible to Gerico that the Commission should wilfully and obstinately cause the loss of service to the public and to Fort Lauderdale even at the time that it is affirmatively considering possible means to remedy the existing situation. Certainly the Commission's action cannot be justified on any basis that it will provide additional service to the area; for this is contrary to fact. The public will not be injured if Channel 10 is not permitted to be used at this time; on the contrary, the Commission will affirmatively benefit the public by preventing the immed iate use of Channel 10. In the meantime, when the Commission has settled upon a final course of action in Miami, whether it be by way of addition of other VHF channels, or by deletion of one or more of the existing VHF allocations, the transition to the new allocations picture can be made without loss to the public.

7907 39. The facts speak for themselves. It does not admit of rational justification that the Commission should, while seeking means for alleviation of the competitive situation in the Miami-Fort Lauderdale area, intemperately aggravate the very condition it seeks to cure and while applying the remedy for the sore, neglectfully kill the patient in between.

The Necessity for Reconsideration and Rehearing

40. There are three affirmative reasons why this proceeding must be reopened for further hearing. It is to be emphasized, however, that reconsideration and rehearing in this matter can be avoided by the Commission if it prevents the use of Channel 10 pending the outcome of its allocations proceedings, provided, of course, that remedial action is the result of those proceedings.

41. There are two distinct and different findings which the Commission is required by statute to make in its deliberations on any application for license (i.e., instrument of authorization): The first is imposed by Section 307(b) of the Act:

> "(b) In considering applications for licenses, and modifications, and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

the second is imposed by Section 309(a) of the Act:

> "(a) If upon examination of any application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

Any decision by the Commission in which the required findings are omitted is fatally defective. Federal Trade Commission v. The B. F. Goodrich Company, et al., _____ U. S. App. D. C. _____, (Cases 13,070 - 13,109) decided February 28, 1957, and cases cited.

7908 42. The Commission's finding under Section 309 (a) of the Act is fatally deficient in that it is not based upon all of the pertinent considerations and ignores the very factors which are the basis of the Commission's action in Docket No. 11756, concerning the same area and the same subject matter. As a matter of law, the Commission is required to reach the determination phrased by the Supreme Court in FCC v. Sanders Bros. Radio Station, 309 U. S. 470

> "This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations, -- the existing and the proposed -- will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service."

Here, it has been shown that the granting of a construction permit for Channel 10 and authorization for the use of that Channel will cause the demise of Channel 17. This is a factor which must be weighed by the Commission in any determination of the "public interest, convenience and necessity" and one which petitioner would be absolutely entitled to raise in a protest proceeding under Section 309(c) of the Act, should the Commission fail to consider this question in any application which it grants without hearing. cf. Radio Tifton 12 RR 675. Included in any such determination would be the question of the need for the proposed service as compared with the need for the existing service.

43. The Commission's Order is also fatally defective in that it does not make the requisite 307(b) findings, although the Commission, at the time that it made its determination in this proceeding, had before it in Docket No. 11756, the very facts and circumstances concerning the same subject matter which required such a finding.

7909 44. It has been shown, herein, that the Commission's grant of a construction permit, an instrument of authorization, on Channel 10,

will cause Channel 17 to cease operations. The Commission is therefore required to determine whether the grant in question is fair, efficient and equitable within the meaning of Section 307(b) of the Act. In this connection it is noted that any such determination must include an inquiry into the number of services and stations available to the public in Miami and Fort Lauderdale, and the further fact that the instant authorization will cause Fort Lauderdale to lose its only television station (i.e. transmission facility) within the meaning of the second priority set forth in the Sixth Report and Order. It would seem elementary that in a situation, such as this, which will result in destruction of existing services, there can be no tacit or implied 307(b) finding and that such a grant cannot be, on its face, fair, efficient and equitable. It being demonstrated that, prima facie, the instant authorization results in an unfair, inefficient and inequitable distribution of facilities, it necessarily follows that the Commission's grant is fatally defective under Section 307(b) of the Act. See e.g., the Commission's "309(b)" letter to WHAS, Inc., dated February 27, 1957 (BPCT-1950), raising a "question . . . as to the impact upon UHF telecasting . . ." of a new VHF service into an area.

45. Finally, the Commission has, by its authorization for the use of Channel 10 in Miami, in effect modified the license of WITV without either the show cause procedure or the appropriate hearing required under Section 316 of the Act. The Commission has known that its authorization in this proceeding would directly and proximately cause WITV to cease operation and, indeed, acted on this state of facts in initiating the proceedings in Docket No. 11756. It has nevertheless proceeded to authorize the use of Channel 10 without undertaking to afford WITV its statutory protection guaranteed by Section 316 of the Act. Application of the Ashbacker doctrine to this state

7910 of facts would obviously require that this question be determined in consolidated proceedings with the instant proceeding, for if it be determined that WITV's license should not be modified, it would follow

that the instant authorization cannot stand.

WHEREFORE, THE PREMISES CONSIDERED, Gerico Investment Company respectfully requests the Commission to grant to it the following relief:

(a) Stay the construction of a television station on Channel 10, Miami, Florida, pending the resolution of the allocations proceedings affecting the Miami-Fort Lauderdale area; and, if no remedial action is proposed as a result of those proceedings, then

(b) Reconsider and rehear the instant proceedings to determine whether the public interest, convenience and necessity will be served by the addition of Channel 10 and the consequent deletion of Channel 17 in the Miami-Fort Lauderdale area;

(c) Reconsider and rehear the instant proceedings to determine whether the authorization to use Channel 10 in Miami and the consequent deletion of Channel 17 represents a fair, efficient and equitable distribution of radio facilities pursuant to Section 307(b) of the Act; and,

(d) Issue an appropriate order to WITV, pursuant to Section 316 of the Act, requiring it to show cause why its license should not be modified, revoked or cancelled in order to permit operation by Channel 10, consolidating any such proceeding with the instant proceeding on a comparative basis.

Respectfully submitted,

GERICO INVESTMENT COMPANY

By /s/ Fred J. Eden, Jr.

WELCH, MOTT & MORGAN
Its Attorneys

Communications Building
710 Fourteenth Street, N. W.
Washington 5, D. C.

March 11, 1957

7911 [Certificate of Service]

7989 MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Hyde dissenting; Commissioner Bartley dissenting and issuing a statement; Commissioner Craven abstaining from voting; Commissioner Ford not participating.

1. The Commission has before it for consideration: (1) petition to reopen the record, for further hearing, and for stay, and opposition to application by Public Service Television, Inc., for modification of construction permit filed April 15, 1957, by WKAT, Inc. (hereinafter called WKAT); (2) petition for rehearing and other relief filed March 11, 1957, by L. B. Wilson, Inc. (hereinafter called Wilson); (3) petition for rehearing and request for stay filed March 11, 1957, by North Dade Video, Inc. (hereinafter called North Dade); (4) petition for rehearing filed March 11, 1957, by Gerico Investment Company (hereinafter sometimes called Gerico); (5) opposition to petition of WKAT to reopen the record and for other relief filed April 22, 1956, by Public Service Television, Inc. (hereinafter called Public Service); (6) opposition to petitions of Wilson and North Dade for rehearing filed March 15, 1957, by Public Service; (7) opposition to petition of Gerico for rehearing filed March 15, 1957, by Public Service; (8) reply to opposition of Public Service filed April 22, 1957, by Wilson; and (9) reply to opposition of Public Service filed April 22, 1957 by Gerico. All of the above-entitled petitions are filed pursuant to Section 405 of the Communications Act of 1934, as amended, and are directed against the Commission's Decision of February 7, 1957, granting, after comparative hearing, a construction permit to Public Service for a new commercial television station on Channel 10 at Miami, Florida, and denying the applications of WKAT, Wilson and North Dade.

7990 2. A detailed description of the procedural history of this case appears in paragraphs 1 through 3 of the Commission's Decision released February 8, 1957, and need not be repeated. It should be pointed out, however, that on February 4, 1957, WKAT petitioned to reopen the record and enlarge the issues on the question of Public Service's financial qualifications based on the institution (January 9, 1957) of a third competitive airline service on National Airlines' New York-Miami route. Public Service is a wholly owned subsidiary of National Airlines. WKAT alleged that said service would seriously impair the financial position of National and thereby substantially curtail Public Service's financial program; that, in light of statements of representatives of Public Service and National Airlines made before the Civil Aeronautics Board, reflecting upon the contemplated financial distress of National due to the institution of a third competitive airline, the record should be reopened for the purpose of exploring the possible impact of such facts upon Public Service's financial ability to effectuate its proposals made at the comparative hearing.[1/] On February 8, 1957, the Commission issued its order denying said petition. On February 15, 1957, WKAT filed a notice of appeal from said order to the U. S. Court of Appeals for the District of Columbia Circuit.

3. On April 15, 1957, Public Service filed an application for modification of construction permit (BMPCT-4630).[2/] WKAT filed

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1/ New York-Florida Case, CAB Docket Nos. 3051, et al.

2/ Proposed Modifications Contained in Public Service's Application:

(1) Increase the height above average terrain from 905 feet to 953.8 feet.
(2) Change the transmitter location to the present location of WGBS-TV which is approximately 2.2 miles SSW of the site authorized by BPCT-1792. Both locations are on the "antenna farm."
(3) Change the type of antenna from an RCA Super Gain to a RCA TF-12-BH, 12 Bay Superturnstile.
(4) Specify the studio location as southeast corner Biscayne Blvd. and northeast 21st Street, Miami, Florida, in lieu of "to be determined."

a petition in opposition to Public Service's application for modification of construction permit. After a careful consideration of the allegations contained in WKAT's petition, the Commission, on May 1, 1957, denied the same, and granted Public Service's application in accordance with its proposed modifications.

7991 4. WKAT's instant petition is devoted largely to a reiteration of the facts and circumstances attending the institution of a competitive airline on National's New York-Miami route. The allegations thereof are, for the most part, inferences predicting substantial depletion of National's financial resources. These facts, and the inferences WKAT draws therefrom, twice previously have been brought to our attention. On those occasions, we denied WKAT's requests.[3/] We find nothing in the instant petition to persuade us to alter our former conclusions, although certain matters appropriately present themselves for discussion herein.

5. Upon the framework created by reason of the institution of an airline service in competition with Public Service's parent, National Airlines, on the New York-Miami route, WKAT superimposes the proposals contained in Public Service's application for modification of construction permit (BMPCT-4630), contending that said proposals are, in effect, demonstrable symptoms of an economic crisis imposed upon National Airlines as a result of this recently inaugurated airline competition; that said proposals are but a prelude to the advance of a period of austerity which must inevitably tax the resources of Public Service and thus render the effectuation of its original proposals virtually impossible; that the studio facility now proposed by Public Service (the studio facilities of WGBS-TV) represents a substantial departure from the elaborate studio facilities proposed at the comparative hearing, making impossible the fulfillment of Public Service's program

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Memorandum Opinion and Order in re Applications of WKAT, INC., et al., FCC 57-136, Mimeo No. 40973, February 8, 1957.

Commission letter dated May 1, 1957, addressed to WKAT, INC., 1759 North Bay Road, Miami Beach, Florida, Mimeo No. 44188.

proposals, and, indeed, constitutes a modification of the basic characteristics of its permit. In support of these allegations, WKAT cites McClatchy Broadcasting Company v. FCC, 239 Fed. Sec. 19, (D. C. Cir. 1956), and Butterfield Theatres v. FCC, 237 Fed. Sec. 552 (D. C. Cir. 1956). In conclusion, WKAT urges a reopening of the record for the purpose of inquiring into all of the arrangements, agreements and understandings by which WGBS-TV (Storer) is disposing of the aforesaid facilities to Public Service.

6. Parenthetically, it should be noted that with the exception of certain issues hereinafter to be discussed, the petitions of Wilson and North Dade are addressed to the same factual situation as that of WKAT's, namely, the recent institution of a new airline service in competition with National Airlines. They differ only with respect to the area of comparative preference to which our attention is directed,
7992 namely, integration of ownership with management. Wilson and North Dade contend that the comparative preference accorded Public Service with respect to the factor of integration of ownership with management should be reexamined upon a rehearing in order to determine the likelihood of Public Service's president and general manager, Mr. G. T. Baker, fulfilling his intention of devoting 75% of his time in supervising and maintaining the policies of the proposed television operation. Wilson and North Dade argue that the reason given by Mr. Baker in support of his ability to devote such a large amount of his time to Public Service, to wit: the stable state of affairs of National Airlines, of which he is chairman of the board of directors, is now untenable due to the advent of a third competitive airline on National's key (New York-Miami) route. Our remarks with respect to WKAT's petition shall be equally applicable to the petitions of Wilson and North Dade in the absence of specific reference to the contrary.

7. Addressing ourselves first to WKAT's petition, we find nothing therein to warrant a rehearing with respect to the financial qualifications of Public Service. No showing is made of present financial inadequacy, or any reasonably inferable condition approaching

it. Instead, the allegations for the most part consist of predictions of economic ruin based upon a single fact, the existence of which is extrinsic to the internal management and operational affairs of both Public Service and National Airlines. Nevertheless, the consequences of which, it is contended, demand an inquiry into the financial qualifications of Public Service. We are, in effect, asked to equate business competition with economic disaster; anticipated business expansion with inevitable financial demise. We feel such inferences wholly unwarranted.

8. The statement of Mr. Baker, made before the CAB reflecting upon the financial effect the certification of a third competitive airline would have upon National Airlines, when placed in its proper perspective, assumes the character of an argument of advocacy rather than an admission against interest. This is made clear in light of the CAB's failure to find any evidence of destructive financial effect upon National Airlines as a result of the institution of a third competitive air service on National's New York-Miami route. Moreover, petitioner would have us superimpose our judgment over that of CAB in a matter peculiarly within that Board's expert field of knowledge and regulatory jurisdiction; this we decline to do.

9. We fail to see how the proposals contained in Public Service's application for modification of construction permit constitute a modification of the basic characteristics thereof.[4/] It is significant to note that WKAT does not challenge the modification application (BMPCT-4630) from the standpoint of its engineering features, and, accordingly, no demand is made for comparative engineering consideration. Our comparison of the original grant to Public Service with the grant as modified, made in connection with WKAT's previous opposition thereto, reveals no significant engineering
7993 changes. As regards the only other proposal, namely, the acquisition of the studio facilities of WGBS-TV for interim use, WKAT

4/ See footnote 2.

contends that said facilities are structurally inadequate to produce the programming proposed by Public Service in the comparative hearing, and further asserts that this proposal affords sufficient justification for a full inquiry into the financial qualifications of Public Service. The financial qualifications of the several applicants were not a matter of issue in the comparative hearing. WKAT's allegations in this regard, and every reasonable inference that may be drawn therefrom in a light most favorable to petitioner, fail to reveal support for its position. There is no showing either that Public Service cannot adequately effectuate its program proposals through the medium of its proposed interim operation, or that the basis upon which the preference accorded the other applicants over WKAT in the area of programming should be reexamined. In this connection, it should be noted that none of the applicants was preferred in matters of studio and equipment for the reason that in a proceeding such as this studio and equipment proposals establish a basis of comparison only insofar as such proposals are designed to effectuate the overall proposed operation. Accordingly, the interim operation proposed by Public Service does not per se preclude attainment of its program proposals, even though initially the full complement of programs to be offered cannot be fully effectuated on an interim basis. Public Service's plans call for the erection of a permanent studio immediately adjacent to the proposed interim operation. The interim operation will help replace the deleted service of WGBS-TV more readily than originally envisioned and to that extent is in the public interest. Further, the shift from interim to permanent operation poses no significant problems in view of the close proximity of the interim site to that of the permanent location proposed by Public Service. Moreover, no financial problems appear to attend this transition in view of the fact that Public Service's original estimate of costs of construction of its proposed operation made provision for reserve funds sufficient to meet such contingency. We, therefore, conclude that Public Service's acquisition of the studio facilities of WGBS-TV

for interim operation is reasonably consistent with its original proposal and properly designed to effectuate the object of its permit.

10. We fail to appreciate what value, if any, may be had from a comparison of the modifications of the construction permit proposed in the Butterfield and McClatchy cases, supra, which caused the U. S. Court of Appeals to remand these cases for further proceedings, with those proposed by Public Service in the instant proceeding. Absent any issue of fraud as was raised in the McClatchy case, or other form of alleged misrepresentation on the part of an applicant, the test, it seems, as to whether further proceedings should be ordered is whether the proposed modifications alter the characteristics of a given permit in such manner as to prejudice the rights of competing parties to a fair and full hearing. In the present case, a comparison of the modifications with the proposals made in the hearing upon which the particular permit in question was granted discloses no such prejudice.

7994 11. Finally, WKAT has alleged no facts which would indicate that Public Service's arrangement with WGBS-TV (Storer), in connection with its acquisition of Storer's physical plant facilities, is either detrimental to the public interest or in violation of any of the Commission's Rules and Regulations. In order to accede to WKAT's request that we examine the foundations upon which the negotiations between Public Service and Storer are based, we would be compelled to place a strained and unwarranted construction on Rule 1.342 of the Commission's Rules and Regulations.[5/]

5/ Section 1.342 in substance requires the filing with the Commission of verified copies of all documents, instruments, contracts, and the substance of oral contracts reduced to writing, together with amendments, supplements, and changes therein and cancellations thereof within thirty days of the execution thereof with respect to transactions relating to network service, ownership or control of licensee's or permittee's stock or voting rights; mortgage or loan agreements restricting licensee's or permittee's amount of dividends payable, purchase of new equipment, maintenance of current assets, etc.; and contracts relating to sale of broadcast time, functional music operations, or changes in management personnel.

12. Our views, hereinabove expressed, are similarly applicable to those aspects of Wilson's and North Dade's petitions bearing upon Mr. Baker's likelihood of devoting 75% of his time to the operations of Public Service because of the additional competition facing National Airlines in the form of a newly instituted air service on the New York-Miami route. The subtle interplay of economic forces within any given commercial enterprise, including passenger air service, may, of course, upset the desirable managerial-operational balance therein, but we hardly think the possible operation of such an economic phenomenon, short of clear and convincing indications of an abrupt disruption of the internal affairs of such enterprise, calls for a rehearing within the context of this case.

13. We next turn to the further issues raised by Wilson as grounds for rehearing, reconsideration and request for stay. Petitioner contends in substance that the decision rests upon an erroneous evaluation of the criteria of integration of ownership with management, local residence, broadcast experience and program proposals. In addition, certain conclusions are specifically challenged as being erroneous. In support of its contentions, petitioner reasserts matters previously raised during the hearing and fully covered in the Commission's decision. We have painstakingly searched the record in an effort to discover any sound basis in support of petitioner's contentions. We find the record firmly sustains our decision and, therefore, conclude that, severally and collectively considered, said contentions fall short of meriting the relief prayed for.

7995 14. Wilson and North Dade each seek a reconsideration of the allegedly false testimony of Mr. A. Frank Katzentine, president and director of WKAT, on the basis of his assertedly undeniable claim of attorney-client privilege in the (WMIE) hearing, in connection with his refusal to divulge certain information concerning the business dealings of the so-called "Secret Six," and his abandonment of such claim in the instant proceedings. During the course of the instant hearing in relation to this matter, certain objections were

interposed by WKAT's counsel to questions of Wilson's counsel which sought to impeach the credibility of Mr. Katzentine in this regard. In ruling on said objections, the presiding officer stated:

> "The Presiding Officer: As Mr. Porter states, It may be that he (Mr. Katzentine) was mistaken in his claim of privilege. That is all we can say. There was no ruling at that time (WMIE hearing). It may have been that the ruling should have been at that time, Mr. Resnick, that he was not entitled to claim the privilege. I do not know." Emphasis added.

We think the presiding officer's ruling (as emphasized)was sound; it was fully considered in our decision and further reconsideration is not required.

15. The substance of the remaining allegations made by North Dade consists largely of a verbatim restatement of its position as it appears in its exceptions heretofore reviewed by us and, as such, fails to advance any new facts, theory or interpretation of the record to warrant reconsideration, further hearing, or stay. In our decision we did not indicate our ruling upon each exception presented. We cannot agree with North Dade that this constitutes a violation of the provisions of Section 8(b) of the Administrative Procedure Act, since a specific ruling on each minor exception is not indispensable, so long as the parties are not left to speculate with respect to the material findings of fact and the basis of the Commission's determination with respect thereto. KFH v. FCC, _____ U.S. App. D. C. _____. With the thought in mind of dispelling any doubts upon this subject, however, we affix hereto, and incorporate herein, as though fully set forth, our ruling upon each exception presented, all as contained in Appendix "A".

16. We next consider Gerico's petition for reconsideration, rehearing and request for stay. Gerico is an existing licensee of Channel 17, Fort Lauderdale, Florida (WITV). At the outset, Public Service maintains that Gerico is a stranger to these proceedings, not having been a party to the comparative hearing, and, thus, has no standing or right to seek relief in whatever form. Apart from the

question of whether Gerico is entitled to the relief it seeks, it would appear that it has sufficiently alleged standing within the meaning of Section 405 of the Act to petition for rehearing. We thus reject Public Service's contentions to the contrary.

7996 17. Turning to the merits, Gerico's petition outlines the UHF-VHF controversy with respect to the problem of deintermixture, placing particular emphasis on the role it has played with respect thereto. A stay of construction of Public Service's permit is urged pending a determination of the allocations proceedings, dealing with the UHF-VHF problem, now under consideration by the Commission. Since, it is argued, the grant of a construction permit for Channel 10 will cause the demise of Channel 17, the Commission's finding of public interest, convenience and necessity required under Section 309(a) of the Act is fatally defective in that the Commission failed to make a determination of the need for the proposed service (Channel 10) as compared with the need for the existing service (Channel 17). As hereinafter will be demonstrated, Section 307(b) considerations are not germane to the present case. In the absence of a Section 307(b) issue, the Commission is under no duty to make a finding of need to support the grant of an application when a non-interfering frequency is available. We, therefore, conclude that our finding of public interest, convenience and necessity to support the instant grant complies with the standard provided in Section 309(a) of the Communications Act of 1934, as amended.

18. Gerico further contends that the Commission is required to determine whether the grant in question complies with the standard of fair, efficient, and equitable license distribution provided for in Section 307(b) of the Act. The 307(b) standard of "fair, efficient and equitable" distribution of broadcast licenses has been achieved in the Table of Assignments established in our Sixth Report and Order. 6/

6/ 1 RR Part 3, Page 91:604 reads in part as follows:

13. The Communications Act of 1934, among other things, establishes as a responsibility of the Commission the "making available to all people of the United States, an efficient, nationwide, radio service", (Sec. 1), and the effectuation of the distribution of radio facilities in such a manner that the result is fair, efficient and equitable and otherwise in the public interest from the standpoint of the listening and viewing public of the United States (Sections 303 and 307(b). Our conclusion that these standards can best be achieved by the adoption of a Table of Assignments is based (footnote cont'd on page 30)

This is not to say that inequities, if and when they appear within the television allocation structure established in the Table of Assignments, are irremediable. The essential fallacy of petitioner's argument lies in its failure to draw a distinction between the Commission's quasi-legislative power and function, on the one hand, and its quasi-judicial power and function, on the other. Adjudication may not be transformed into rule making merely because the distinction between them may involve difficulty of recognition in a given case. The within matter is an adjudicatory proceeding. Petitioner's argument proceeds on the theory that because the original expectations for the development of a nation-wide system of television channel allocations through the use of the UHF-band on an intermixed basis have not materialized, the table of assignments adopted in our Sixth Report and Order of 1952 is contrary to public interest, convenience and necessity and violates the standard of fair, efficient and equitable license distribution provided by Section 307(b). This argument, however advanced, is, in substance, an attack upon the wisdom of the television channel allocation plan. The legal basis of the plan, however, is left undisturbed. In this connection, it must be remembered (1) that the Sixth Report and Order adopting the present television allocation scheme was the culmination of rule making proceedings lasting several years, and resulted in our decision to adhere to the concept of a table of television channel assignments rather than the application or demand method of assigning television channels;
7997 (2) that our decision in this regard, as well as the rule making

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6/ (Cont'd from page 8)
upon three compelling considerations: A Table of Assignments makes for the most efficient technical use of the relatively limited number of channels available for the television service. It protects the interests of the public residing in smaller cities and rural areas more adequately than any other system for distribution of service and affords the most effective mechanism for providing for non-commercial educational television. It permits the elimination of certain procedural disadvantages in connection with the processing of applications which would otherwise unduly delay the overall availability of television to the people.

proceedings which formed the basis of it, constituted a proper exercise of our quasi-legislative power. Logansport Broadcasting Corp. v. U. S., 210 F (2nd) 24; (3) that the validity of the Table of Assignments in terms of public interest considerations is firmly established; and (4) that in awareness of the need of amendments to Section 3.606 of our Rules and Regulations, we have instituted rule making proceedings looking toward the formation of a long range program designed to improve the television allocation structure and, in the interim, to consider channel changes with the view to improving the immediate television situation in individual communities. It is within the framework of these proceedings to which petitioner's argument is addressed, and from which relief, if any, must be sought.

19. Finally, Gerico contends that the Commission, by its authorization of the use of Channel 10, in effect, modified its Station (WITV) license without the appropriate show cause procedure required by the provisions of Section 316(a) of the Act. Petitioner gratuitously assumes that among the privileges inherent in the grant of an instrument of authorization permitting the use and operation of a television broadcast station is the privilege to engage in the business enterprise of commercial broadcasting free from the operation of economic conditions unfavorable to the use of the facility with which a licensee is entitled to deal by virtue of such grant. We are unable to find any support for such an assumption in the form of either statutory authority, or in the Commission's Rules and Regulations, or policy, or court decisions. We are not unmindful of the fact that the term "modification", as used in Section 316(a) of the Act, contemplates not only changes which may occur to an existing license through direct action, i.e., by virtue of a literal change of its terms, but, also, through indirect action by a grant to a proposed station of broadcasting facilities, the use of which results in electrical interference to the existing station within its normally protected contour. Indeed, Section 3.24 of the Commission's Rules and Regulations provides adequate protection against such a

situation in the standard radio broadcast field.[7] Similarly, in the television broadcast field, protection commensurate with the nature of the subject is provided by Section 3.621 of our Rules and Regulations.[8] It is significant to note that Gerico's petition makes no cognizable claim of modification of the terms of its license because of electrical interference, direct or indirect. Gerico, nevertheless, contends that its license "will, absent the requested stay of construction, have been modified by the Commission's action in the Channel 10 proceeding as surely as if the Commission had suddenly permitted another station to destroy WITV's signal through electrical interference." Petitioner relies upon the so-called Ashbacker Doctrine to support this statement.[9] We

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[7] Sec. 3.24, Rules and Regulations, provides in pertinent part:

> Broadcast facilities; showing required. - . . .
>
> (b) An authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:
>
> (2) That objectionable interference will not be caused to existing stations or that if interference will be caused the need for the proposed service outweighs the need for the service which will be lost by reason of such interference. That the proposed station will not suffer interference to such an extent that its service would be reduced to an unsatisfactory degree (For determining objectionable interference, see Secs. 3.182 and 3.186).

[8] Sec. 3.612, Rules and Regulations, provides:

> Protection from interference. Permittees and licensees of television broadcast stations are not protected from any interference which may be caused by the grant of a new station or of authority to modify the facilities of an existing station in accordance with the provisions of this subpart. The nature and extent of the protection from interference accorded to television broadcast stations is limited solely to the protection which results from the minimum assignment and station separation requirements and the rules with respect to maximum powers and antenna heights . . . .

[9] The Ashbacker Doctrine holds, in substance, that where two bonafide applications are mutually exclusive the grant of one without a hearing of both deprives the other applicant of an opportunity to a hearing to which he is entitled with respect to his application. Otherwise stated, where two or more applications are for a facility which can be granted to only one, the grant thereof to one of the applicants, without a hearing, operates as a modification of a license to which the other applicants may have been entitled. Ashbacker Radio Corp. v. FCC, 326 U.S. 327.

are thus called upon to determine the question of whether the petition of an existing television licensee, which alleges a modification of its license to have resulted from a grant of a construction permit for a proposed television broadcast facility, yet which concedes the grant there-
7999 of will not result in electrical interference to the use and operation of its broadcast facility, is entitled to a hearing pursuant to Section 316(a) of the Act. In our opinion, to state the question is to answer it, and that answer must be in the negative.

20. With respect to Ashbacker Radio Corp. v. FCC, 326 U. S. 327, it is sufficient, we feel, to observe that the modification doctrine enunciated therein was made with reference to an electrical interference situation occasioned by two competing applications for an identical frequency, and any application of that doctrine outside the area of that species of interference, as is herein sought, is clearly unwarranted.

21. In view of the foregoing, IT IS ORDERED, That the above-described petitions of WKAT, Inc., L. B. Wilson, Inc., North Dade Video, Inc., and Gerico Investment Company ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION *

/s/ Ben F. Waple

Ben F. Waple
Acting Secretary

Adopted: September 11, 1957

Released: September 13, 1957

*DISSENTING STATEMENT OF COMMISSIONER BARTLEY

The majority's award of the permit in this case to Public Service was based in large part on the preference given to that applicant in the area of integration of ownership with management, principally because of Mr. Baker's proposal to devote 75% of his time to the operation of the television station (See Conclusions 27 - 29, 62; Decision, 22 FCC 198-199, 209).

I am of the opinion that petitioners have made a sufficient showing of new developments, subsequent to the close of the record in this case, which could adversely affect the proposed integration of Mr. Baker, this having constituted one of the strongest factors in that applicant's favor. Accordingly, I would reopen the record in this regard to determine whether these proposals can still be carried out.

I have heretofore indicated my position with respect to the questions raised regarding Public Service's financial ability to effectuate its proposals made at the comparative hearing, in the light of subsequent events. (See Dissent to Memorandum Opinion and Order of February 7, 1957, 22 FCC 115) I adhere to that position in view of the showings made in the instant petitions dealing with this matter.

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APPENDIX "A"

Exceptions of North Dade Video, Inc. to Findings of Fact

Exception No.	
1, 20, 28, 41, 44, 47, 49, 50, 55	Denied as being immaterial to the decision.
2, 5, 6, 9, 10, 12, 13, 15, 16, 17, 18, 19, 23, 24, 25, 26, 31, 32, 34, 35, 37, 48, 53, 54	Granted to the extent the initial decision has been modified and denied in all other respects as being immaterial or unsupported by the record.
3, 4, 7, 8, 11, 14, 21, 22, 27, 29, 30, 33, 36, 38, 39, 40, 42, 43, 45, 46, 51, 52, 56.	Denied. The decision adequately reflects the record.

Exceptions of North Dade Video, Inc. to Conclusions

1, 3, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 20, 22, 27 (sic p. 26).	Granted to the extent the initial decision has been modified and denied in all other respects as being unsupported by the record.

Exception No.	
2.	Granted to the extent that WKAT was not found to be superior to Public Service.
10, 11, 18, 19, 21, 23, 24, 25, 47 (sic p. 46) 27, 28.	Denied. The decision adequately reflects conclusions based upon the findings.

Exceptions of L. B. Wilson, Inc. to Findings of Fact

9, 10, 14, 21, 24, 26, 31, 34, 35, 36, 39, 41, 46, 51, 89, 95, 137, 168.	Denied as being immaterial to the decision.
52, 121, 159.	Denied. The Examiner's ruling is sustained.
1, 3, 5, 7, 8, 13, 15, 17, 19, 20, 22, 27, 28, 29, 32, 33, 37, 38, 42, 44, 48, 49, 58, 60, 70, 74, 78, 79, 82, 83 84, 104, 107, 111, 115, 117, 119, 129, 130, 131, 132, 133, 138, 140, 141, 143, 144, 145, 146, 149, 150, 151, 152, 153, 154, 155, 156, 164, 166.	Granted to the extent the initial decision has been modified.
8001 2, 4, 6, 43, 59, 62, 63, 65, 66, 68, 69, 71, 72, 73, 75, 76, 77, 80, 81, 86, 87, 88, 90, 93, 94, 100, 101, 102, 105, 108, 109, 110, 112, 116, 126, 135, 139, 147, 148, 158, 160, 163, 167.	Granted
11, 12, 16, 18, 23, 25, 30, 45, 53, 54, 55, 56, 57, 61, 64, 67, 96, 97, 98, 99, 103 106, 113, 114, 120, 122, 123, 124, 125, 127, 128, 134, 142, 157, 161, 162, 165, 169.	Denied. The decision adequately reflects the record and the additional findings requested are unnecessary.

Exception No.	
47, 50, 92.	Denied. Not proper findings of fact.
40, 85, 91, 118, 136.	Granted in part.

Exceptions of L. B. Wilson, Inc. to Conclusions

170, 171, 172, 173, 174, 175, 176, 177, 179, 180, 181, 183, 184, 187, 190, 191, 193, 195, 197, 198, 199, 200, 202.	Granted to the extent the initial decision has been modified and denied in all other respects as being unsupported by the record.
178, 182, 185, 186, 188, 189, 192, 194, 196, 201, 203, 204.	Denied. The decision adequately reflects conclusions based on the findings.

Exceptions of Public Service Television, Inc. to Findings of Fact

2, 8, 15, 21, 22, 23, 27, 29, 30,35, 40, 50, 52, 53, 58, 63, 67.	Denied. The decision adequately reflects the record.
1, 4, 5, 6, 7, 9, 11, 13, 14, 16, 17, 24, 28, 32, 33, 34, 36, 37, 38, 39, 42, 45, 49, 51, 54, 56, 57, 59, 60, 61, 65, 66, 68, 69, 70.	Granted to the extent the initial decision has been modified and denied in all other respects as being immaterial or unsupported by the record.
12, 18, 26, 31, 41, 46, 47, 48, 62.	Denied as immaterial.
3, 19, 43, 44, 55.	Denied. Not supported by the record.
8002	
10.	Denied. The Examiner's ruling is sustained.
20, 25.	Granted
64.	Denied; no record citation.

Exception No.

Exceptions of Public Service Television, Inc. to Conclusions

72, 73, 74, 75, 78, 79, 80, 81, 82, 84, 85, 86, 87, 88, 92, 93, 94, 95, 97.	Granted to the extent the initial decision has been modified to conform to the facts and Commission policy.
71, 83, 89, 90, 91, 96.	Denied. The decision adequately reflects conclusions based upon the findings.
76, 77.	Denied as immaterial.

[Filed October 14, 1957]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GERICO INVESTMENT COMPANY,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

Case No. 14, 179

NOTICE OF APPEAL AND STATEMENT OF REASONS ON WHICH APPELLANT RELIES

Gerico Investment Company, Appellant in the above-captioned case, hereby gives notice of its appeal from the Federal Communications Commission to the United States Court of Appeals for the District of Columbia Circuit of (1) a decision and order of the Federal Communications Commission released on February 8, 1957, granting the application of Public Service Television, Inc., for a construction permit for a new commercial television station to be operated on Channel 10, in Miami, Florida, and (2) a Memorandum Opinion and Order of the Federal Com-

munications Commission released on September 13, 1957, by which a Petition for Reconsideration, Rehearing and Request for Stay of Construction, filed with the Commission by Gerico Investment Company on March 11, 1957, was denied. This appeal is taken pursuant to the provisions of Section 402(b) of the Communications Act of 1934, as amended, 66 Stat. 718, 47 U.S.C. 402(b), and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009.

STATEMENT OF THE NATURE OF THE PROCEEDINGS AS TO WHICH APPEAL IS TAKEN

1. On February 8, 1957, after a comparative proceeding among four applicants, the Federal Communications Commission issued a final decision granting the application of Public Service Television, Inc., a subsidiary corporation of National Airlines, for a construction permit for a new commercial television station to be operated on Channel 10, in Miami, Florida.

2. Thereafter, on March 11, 1957, Gerico Investment Company, the licensee of television station WITV, which operates on UHF Channel 17, in Fort Lauderdale, Florida, filed a timely Petition for Reconsideration, Rehearing and Request for Stay of Construction under Section 405 of the Communications Act of 1934, as amended, directed against the Commission's action of February 8, 1957.

3. Fort Lauderdale, which is the principal city of Broward County, Florida, and Miami, which is the principal city of Dade County, are approximately 25 miles apart. Under the Sixth Report and Order, three commercial VHF Channels and two commercial UHF channels were assigned to Miami, and two commercial UHF channels were assigned to Fort Lauderdale. Because of airspace considerations, an "antenna farm" has been established in the Miami-Fort Lauderdale area, approximately 14 miles north of Miami and 10 miles south of Fort Lauderdale, in which all of the existing commercial television antennas are situated for both Miami and Fort Lauderdale. Insofar as geographical coverage is concerned there is no appreciable difference between the service areas of the Miami stations and the Fort Lauderdale station.

4. VHF station WTVJ has been operating on Channel 4, Miami, since 1948, or before the initiation of the nationwide allocations proceeding which resulted in the Sixth Report and Order. It is a "pre-freeze" station. Gerico Investment Company, a Florida corporation, whose principal stockholders and officers are longtime residents of Fort Lauderdale, applied for and received a construction permit for Channel 17, Fort Lauderdale, in mid-1952. The station commenced operation in November of 1953.

5. In the same year WFTL, another Fort Lauderdale UHF station commenced operation. Subsequently, in 1954, Gore Publishing Company, the permittee of WFTL, assigned its construction permit to Storer Broadcasting Corporation, which, with the permission of the Commission, relocated the said channel in Miami, continuing operation as WGBS-TV, Channel 23. Since early in 1954, WITV has been the only television station serving Fort Lauderdale as a transmission service as distinguished from a reception service, a distinction historically a part of Section 307(b) of the Communications Act of 1934, as amended, and set out in the "priorities" which became a part of the assignment principles adopted by the Commission in the Sixth Report and Order.

6. In April of 1955, Gerico and Storer filed certain petitions with the Commission requesting remedial rule-making proceedings looking toward the partial deintermixture of the Miami-Fort Lauderdale area. These petitions were based upon the operating experience of Gerico and Storer and similarly situated UHF broadcasters, which indicated that the allocations policy adopted by the Commission in the Sixth Report and Order of specifically intermixing VHF and UHF assignments was invalid.

7. At the same time, Gerico and Storer attempted to intervene in the then-pending comparative proceedings involving Channels 7 and 10 in Miami and, in the alternative, requested that the Commission stay the comparative decisions pending resolution of the rule-making proceedings.

8. No formal action was taken by the Commission until October 20, 1955, when the Commission dismissed the requests for stay. Thereafter, on November 10, 1955, the Commission "denied" the rule-making

petitions, deferring all deintermixture proposals then on file with the Commission, to an overall examination of allocations policy in a new rule-making proceeding initiated on that date in FCC Docket 11532.

9. Petitions for reconsideration were filed by Gerico and Storer relating to the Commission's decisions of October 20, 1955, and November 10, 1955. On January 20, 1956, the Commission simultaneously denied Gerico's petition and granted a construction permit to Biscayne Television, Inc., in the Miami, Channel 7 proceeding. Appeals from all of the above-mentioned orders were taken by Gerico and the Commission was subsequently affirmed by this Court on January 17, 1957.

10. In June, 1956, however, the Commission concluded its proceedings in Docket 11532, the overall rule-making proceeding. As a part of its decision, therein, the Commission, on its own motion, initiated certain "remedial" rule-making proceedings, some looking toward deintermixture of certain markets on a UHF basis, others toward deintermixture on a VHF basis, and all intended, according to the Commission, to provide for more effective competition among a greater number of stations in areas in which the Commission's intermixture policy had failed to provide such service. In effect, the Commission, in Docket 11532, reversed its earlier position on intermixture as a policy of allocations.

11. With respect to the Miami area, the Commission proposed to add VHF Channel 6, a plan stated to be "more meritorious" than the deletion of any of the existing VHF channels. Comments in that rule-making proceeding (FCC Docket 11756) were filed by Gerico on December 15, 1956, suggesting that the said Channel should be assigned to Fort Lauderdale, and pointing out certain technical matters which indicated that the plan of VHF deintermixture might not, in fact, be more "meritorious" than a plan of UHF deintermixture.

12. Thereafter on February 8, 1957, the Commission made its grant to Public Service Television, Inc., authorizing the use of Channel 10 in Miami. No mention was made in the said decision as to any of the matters involving Gerico or the pending Miami rule-making proceeding. On March 11, 1957, Gerico filed its Petition for Reconsideration, as noted above.

13. By an agreement consummated on or about April 13, 1957, Public Service Television, Inc., acquired the entire plant and equipment of Storer Broadcasting Company and WGBS-TV, Channel 23, went off the air.

14. On April 29, 1957, the Commission issued an Order in the Miami rule-making proceeding, proposing to add Channel 6, but denying Gerico's request that the Channel be assigned to Fort Lauderdale, and denying certain technical proposals also advanced by Gerico concerning the utilization of Channel 6. Although the Channel was assigned, according to the Commission, to offset the "loss in available service" to the public which, the Commission acknowledged, was resulting from its Miami VHF authorizations, the Commission did not then, or at any time thereafter, act to authorize Gerico to utilize the substitute channel, or to accord Gerico any of the procedural safeguards applicable to modifications of license by the Commission under Section 316 of the Communications Act of 1934, as amended. A timely Petition for Reconsideration, together with a Motion for the issuance of a Modified License, which included a prayer for the institution of appropriate proceedings under Section 316 of the Act as alternative relief, was filed by Gerico in Docket 11756. No action has been taken by the Commission on either matter.

15. Public Service commenced operation of Channel 10 in August, 1957, with an ABC network affiliation. All commercial network programs theretofore ordered for WITV were terminated and reordered for WPST. Since that date, WITV has suffered and continues to suffer substantial and irreparable injury through loss of revenue. WITV has continued to operate, although in a substantial loss position, in order to continue to provide a television service to the public pending decision by the Commission on this and the other proceedings before it. Finally, on September 13, 1957, the Commission issued its order in this case denying Gerico's Petition and request for stay. As a person aggrieved by the Commission decisions, Gerico files this appeal pursuant to the provisions of Section 402(b) of the Communications Act of 1934, as amended.

STATEMENT OF REASONS ON WHICH APPELLANT RELIES

1. The Commission acted arbitrarily, capriciously, unreasonably and unlawfully in granting a construction permit for the use of Channel 10, Miami, without applying the statutory standards set out in Section 307(b) of the Communications Act of 1934, as amended.

2. In granting a construction permit for the use of Channel 10, Miami, the Commission arbitrarily, capriciously, unreasonably and unlawfully failed to take into consideration essential elements bearing on the public interest, convenience and necessity, in violation of Sections 307 and 309 of the Communications Act of 1934, as amended.

3. By granting a construction permit for the use of Channel 10, Miami, the Commission arbitrarily, capriciously, unreasonably and unlawfully modified the license of Gerico Investment Company without affording to Gerico the right to a hearing required by the provisions of Section 316 of the Communications Act of 1934, as amended.

4. The Commission acted arbitrarily, capriciously, unreasonably and unlawfully in refusing to rehear or reconsider its grant of a construction permit for the use of Channel 10, Miami, on the petition of Gerico Investment Company.

5. The Commission acted arbitrarily, capriciously, unreasonably and unlawfully in refusing to stay the construction of a station on Channel 10, Miami, at the time of the initial grant and upon the petition of Gerico Investment Company.

PRAYER FOR RELIEF

WHEREFORE, The Appellant prays that the Commission's orders from which the instant appeal is taken by reversed and vacated; that the cause be remanded for further proceedings in accordance with law; and that the Appellant be accorded such other and further relief as may be

determined just and proper in the premises.

Respectfully submitted,

GERICO INVESTMENT COMPANY

By /s/ Fred J. Eden, Jr.

Its Attorney

WELCH, MOTT & MORGAN
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October 14, 1957

[Certificate Of Service]

[Filed October 21, 1957]

NOTICE OF INTENTION TO INTERVENE

Public Service Television, Inc., files herewith its Notice of Intention to Intervene pursuant to the requirement of Rule 37(d). There is attached hereto a verified statement showing the nature of the interest of Public Service Television, Inc., in this appeal.

Respectfully submitted,

PUBLIC SERVICE TELEVISION, INC.

By /s/ Norman E. Jorgensen
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Dated: October 21, 1957

[Certificate Of Service]

AFFIDAVIT

I, G. T. Baker, President of Public Service Television, Inc., permittee and operator of WPST-TV, a television broadcast station operating on Channel 10, Miami, Florida, am making this Affidavit pursuant to Rule 37(d) of the United States Court of Appeals for the District of Columbia Circuit in order to show the nature of the interest of Public Service Television, Inc. in this proceeding and the grounds upon which Public Service Television, Inc. seeks to intervene.

The Order of the Federal Communications Commission adopted September 11, 1957 and released September 13, 1957 appealed from in this proceeding denied Appellant's petition for re-hearing. Public Service Television, Inc. has constructed WPST-TV on Channel 10 at Miami, Florida, and is presently operating that station as authorized by the Federal Communications Commission.

Since this appeal seeks to reverse the order of the Federal Communications Commission denying Appellant's petition and the facility involved in the proceeding is channel 10 at Miami on which Public Service Television, Inc. is presently providing a television service to the Miami community, the interest of Public Service Television, Inc. in this appeal is clear.

/s/ G. T. Baker

[JURAT, Dated Oct. 18, 1957.]

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,179

GERICO INVESTMENT COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

PUBLIC SERVICE TELEVISION, INC.,

Intervenor.

APPEAL FROM THE FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals
For the
District of Columbia Circuit
FILED
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QUESTIONS PRESENTED

Counsel for all the parties hereby stipulate that the following are the issues presented in this case, it being agreed and understood that the parties do not concede the correctness of any legal or factual premises implicit in the formulation of the questions and further that Appellee and Intervenor reserve the right to argue that any or all of the following questions are not properly before the court:

(1) Whether the Federal Communications Commission, in granting a construction permit for the use of Channel 10 in Miami, Florida, arbitrarily, capriciously, unreasonably or unlawfully:

(a) Failed to apply Section 307(b) of the Communications Act of 1934, as amended; and /or

(b) Failed to take into consideration essential elements bearing on the public interest, convenience and necessity, in violation of Sections 307(a) and 309 of the Communications Act of 1934, as amended; and/or

(c) Modified the license of Gerico Investment Company without affording to Gerico the right to a hearing required by the provisions of Section 316 of the Communications Act of 1934, as amended.

(2) Whether the Commission acted arbitrarily, capriciously, unreasonably or unlawfully in refusing to rehear or reconsider its grant of a construction permit for the use of Channel 10, Miami, Florida, on the Petition of Gerico Investment Company.

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UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 14,179

GERICO INVESTMENT COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

PUBLIC SERVICE TELEVISION, INC.,

Intervenor.

APPEAL FROM THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by Gerico Investment Company (here called Gerico) licensee of Television Station WITV, Channel 17, Fort Lauderdale, Florida, from Orders of the Federal Communications Commission (here called the Commission) (1) granting a construction permit for the use of Channel 10, Miami,Florida, to Public Service Television, Inc. (here called Intervenor), and (2) denying Gerico's Petition for Reconsideration, Rehearing and Request For Stay of Construction directed against the said order authorizing the use of Channel 10.

The appeal is taken pursuant to the provisions of Section 402(b) of the Communications Act of 1934, as amended, 66 Stat. 718, 47 U.S.C. Sec. 402(b), and Section 10(e) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. Sec. 1009(e). The Commission's final order in the Channel 10 proceeding was released on February 8, 1957; Gerico's Petition for Reconsideration was filed, under Section 405 of the Communications Act of 1934, as amended, 48 Stat. 1095, as amended, 66 Stat. 720, 47 U.S.C. Sec. 405, on March 11, 1957; the Commission's Order denying Gerico's Petition for Reconsideration was released on September 13, 1957; and Gerico's Notice of Appeal to this Court was filed on October 14, 1957.

STATEMENT OF THE CASE

This case involves an appeal by Gerico Investment Company, licensee of Television Station WITV which operates on Channel 17, Fort Lauderdale, Florida, from orders of the Federal Communications Commission finally authorizing the use of Channel 10, Miami, Florida, and denying Gerico's Petition for Reconsideration, Rehearing and For Stay of Construction directed against the aforesaid order of authorization. Because the case involves both adjudicatory and allocations questions, and because the distinction between the two is a necessary and vital point in the consideration of this case, the discussion of the factual background of the case will attempt to delineate these differences.

Miami, the principal community of Dade County, Florida, is situated approximately 25 miles south of Fort Lauderdale, the principal community of Broward County, Florida, measuring city center to city center. In the Sixth Report and Order, which concluded the general, nationwide allocations proceeding, three VHF channels 4, 7 and 10, were assigned to Miami; none were assigned to Fort Lauderdale. Instead, two commercial UHF channels, one of them Channel 17, were assigned to Fort Lauderdale. Proposals which would have permitted the assignment of at least one VHF channel to Fort Lauderdale were

rejected by the Commission.

At the time of the issuance of the Sixth Report, television station WTVJ had been operating on Channel 4 in Miami for nearly four years. Operating with limited facilities and with its antenna near the center of the city of Miami, WTVJ provided no better than a Grade B service to Fort Lauderdale. Because no other service, from any station, was then available, however, there were no sets in the Miami-Fort Lauderdale area capable of receiving UHF television signals.

Gerico Investment Company was formed by a group of Fort Lauderdale businessmen, each a prominent, longtime resident of the area, for the purpose of applying for a construction permit for a Fort Lauderdale television station. Its application for Channel 17 was filed late in the spring of 1952 and granted, without opposition, shortly thereafter. At the same time, Gore Publising Company applied for and received the other Fort Lauderdale UHF Channel.

Gerico's original construction permit called for the construction of an antenna near the city of Fort Lauderdale, consistent with the then-subsisting policy of the Commission of requiring television stations to construct their antennas as close to the center of the principal community as possible. As originally authorized, Gerico would have provided no better than a Grade B service to Miami.

Shortly after Gerico received its construction permit, however, a Marine Corps Air Base within two miles of its proposed antenna location was reactivated and the proposed Gerico tower structure became an objectionable hazard to air navigation. Because of extremely heavy air traffic and numerous air defense bases in the area, which then created a difficult and complex air hazard situation from unshielded tall structures and which, with the passage of time, has become even more difficult and complex, conferences were instituted by Gerico and other interested broadcasters with all affected airspace parties, both governmental and non-governmental, which resulted in the creation,

early in 1953, of an antenna "farm" area approximately 14 miles north of Miami and 10 miles south of Fort Lauderdale in which tall structures to support television antennas were authorized for construction up to heights of 999 feet. The creation of the farm area represented a compromise between communications interests, who, under the Commission's Rules and Regulations were technically permitted to utilize antennas of 2,000 feet in height in the particular zone in which these communities are situated, and the airspace interests who caused the rearrangement of existing airways and minimum en route altitudes in order to afford airspace for the erection of otherwise objectionable structures. Thereafter, all existing and proposed television stations ultimately proposed to situate their antennas within the antenna farm area. Gerico's construction permit was modified, accordingly, and the station was thereafter constructed to operate from the common antenna farm.

The effect, however, of utilization of the antenna farm area by all stations in the Miami-Fort Lauderdale area, was to create of Miami and Fort Lauderdale a single market and, thereafter, it was impossible for a Fort Lauderdale station to deliver, for advertisers, any market or group of viewers not covered by any of the Miami stations. For the purpose of coverage, that is, reception service, there was thereafter no distinction between a Miami and a Fort Lauderdale television station.

Gerico commenced operation on Channel 17 in November of 1953. Shortly thereafter, it increased its power to 465,000 watts. It was preceded on the air by the other UHF channel in Fort Lauderdale. In the meantime, competing applications, by numerous applicants, had been filed for the two available VHF channels in Miami.

Early in 1954, the other Fort Lauderdale UHF channel was acquired, by purchase, by Storer Broadcasting Company, a multiple broadcast owner, having interests in numerous metropolitan areas

across the country. With the authority of the Commission, the channel was redesignated as a Miami facility. Of course, at the time that Gerico commenced operation, there were scarcely a handful of sets in either Dade or Broward counties capable of receiving a UHF television signal.

During the same period, Gerico became affiliated with the ABC television network and Storer with NBC, although, at the outset, the predominant number of desirable commercial network programs of both networks continued to be carried on a delayed, second choice basis, by the sole VHF channel in Miami. At no time was Gerico ever able to secure more than a 90 day agreement from ABC, although the standard affiliation agreement runs for two years and is non-cancellable during such period.

By continuous promotional efforts and intensive measures to improve both the technical and subjective quality of programs the set conversion problem in the Miami-Fort Lauderdale area was gradually overcome. By mid-1956, the estimated conversion ratio stood at 91.6 per cent, and it rose to an estimated 96 per cent by December of the same year. It should be borne in mind that ordinary television receivers can be converted to receive UHF signals only by installation of a special tuning device and a special outside antenna installation. Otherwise, puchase of all-channel receiving equipment, involves a substantial differential in price, together with the necessary antenna installation. The UHF investment in the hands of the public in the Miami-Fort Lauderdale area, representing only the cost of UHF receiving tuners and the differential in price for all channel sets, plus the average cost of antenna installations, exceeds, presently, the sum of $10,000,000.00.

Gerico's initial investment in equipment and plant was approximately $1,000,000. Its equipment includes seven live camera chains and an underwater camera, and the single, most complete remote unit

of any television station in the South Florida area. Because of its technical competence, WITV has been called upon to originate all of the ABC live programs from the Miami area, including the Wednesday Night Fights and on two occasions, despite the presence of an NBC affiliate in the area, was selected by NBC to originate the Florida portions of Wide, Wide World. As further indicated by the affidavit of the President and General Manager of WITV, attached hereto in the Appendix, WITV has consistently attempted to achieve competitive status through technical improvements and special programming. Furthermore, WITV's managerial competence and experience cannot be disputed.

Despite its efforts to achieve competitive status, and its heavy investment in its facilities, WITV nevertheless suffered almost a quarter of a million dollars operating losses during its first two years of operation. During 1956, WITV managed to recoup approximately $75,000.00 of its losses. But, even during this period nearly 80 per cent of its revenues came from the sale of local advertising and 80 per cent of its local business was obtained as a result of desirable adjacencies to network programs. Experience of other television stations in similar markets demonstrates that 60 per cent of their revenue comes from national and regional sources, independent of local business. (See Appendix) Similarly, WITV's rate for all business has never been more than one half that of the VHF stations situated in the same area. Even when WITV had demonstrated its ability to deliver customers for local advertisers and was competitive to the best of its ability in its own community, it nevertheless lost the top rated network programs to its VHF competitors, including such programs as Wyatt Earp, the Danny Thomas Show, Bold Journey, and others, for the reason, as explained by ABC, that advertisers preferred second billing on a VHF station to regularly scheduled time on a UHF. A number of the programs carried by the VHF station from ABC on a delayed, second choice basis, were directly competitive, in time, with other ABC programs which, under the option hour provisions of WITV's

network contract, were required to be carried by WITV.

In January, 1956, the Commission finally authorized the use of Channel 7, Miami, by Biscayne Television, Inc., the Niles Trammell-Cox-Knight interests. The station commenced operation in July, 1956. Although the Commission's final decision was reversed by this Court, Sunbeam Television, Inc. v. Federal Communications Commission, 1957, ___ U.S. App. D.C. ___, 243 F. 2d 26, the Commission refused to suspend the operation of the said station upon the petition of Gerico, and the applicants for said channel and Channel 7 has continued in operation since that date.

Immediately upon the inception of operation by Channel 7, Storer Broadcasting Company lost its NBC affiliation. It nevertheless continued in operation as an independent station. Following the inception of service by Channel 7, Gerico lost substantial revenues, and additional network programs, representing not only network revenue, but the availability of desirable network adjacencies, as well.

After considerable effort, including new intensive sales campaigns, WITV was able, once more, to break into the black, although in a substantially reduced position and, during mid-winter 1956-1957 accomplished a precedent in UHF telecasting; namely, it became commercially competitive with two VHF stations, both network affiliated, and an independent UHF station in a pre-freeze VHF television market.

Thereafter, however, the Commission authorized the use of Channel 10 by Public Service Television, Inc., intervenor herein, on February 8, 1957. Being aware of the effect of a new VHF station upon its revenues, and expecting the loss of its network affiliation, a belief based upon statements of intent previously received from the network and borne out by subsequent conferences with network officials and the final affiliation by ABC with Channel 10 when it commenced operation, Gerico filed a Petition for Reconsideration, For Rehearing and For Stay of Construction directed against the Commission's Order finally

authorizing the use of Channel 10. That petition is set out in full in the Joint Appendix. In summary, Gerico contended that the Commission had failed to make required statutory findings under Sections 307(b) and 309 of the Communications Act of 1934, as amended, had modified Gerico's license without the pre-requisite show-cause proceeding and hearing under Section 316 of the Communications Act of 1934, as amended, and had abused its discretion by failing to preserve a competitive UHF service in an intermixed market of major significance to the ultimate detriment of UHF telecasting on a nationwide basis.

Prior to action by the Commission on Gerico's Petition, including its request for a stay of construction, Channel 10 commenced operation in August, 1957. In the meantime, Storer entered into an agreement with Public Service, the permittee of Channel 10, whereby Storer disposed of all of its operating equipment, transmitting antenna and tower, and studios to Public Service. Storer, thereafter, left the air on April 11, 1957. Thus, although the Commission had authorized a fifth television service in Channel 10, by the time Channel 10 commenced operation, there were but four television services available to the public, the precise situation which obtained at the time of the Channel 10 grant.

Since inception of the Channel 10 service, WITV has suffered approximately a $30,000.00 monthly loss (see affidavit of Mortimer W. Loewi in appendix hereto) and can no longer continue to operate its television station in the Miami area. As recognized by the Commission, its authorization for the use of Channel 10, will result in the deletion of an existing television service, barring other action either by the Court or by the Commission. The ultimate effect, therefore, of the Commission's order of authorization for Channel 10 will be to provide the Miami-Fort Lauderdale area not with a fifth competitive service, but merely a third VHF service, replacing two UHF services previously existing.

The effect of the Commission's order, will also cause Fort

Lauderdale to be deprived of its only television transmission service while providing Miami with its third such television transmission service.(See Section III, infra.)

Fort Lauderdale is the principal city of Broward County, Florida. At the time when the Commission issued its Sixth Report and Order, assigning two UHF channels to the use of Fort Lauderdale, the last officially reported U.S. Census data indicated that in 1950 Broward County had a population of 83,933, and the city of Fort Lauderdale, a population of 36,328. By April 7, 1955, at which time the United States Department of Commerce, Bureau of the Census, compiled a special census of Broward County, the county population had risen to 159,052, and the city population, to 62,906, increases of 89.5 and 73.2 per cent, respectively. By July 1, 1956, according to the annual population estimates published by the University of Florida, College of Business Administration, Broward County was credited with a total population of 205,100. In addition, many thousands of persons visit Fort Lauderdale each year during the resort season.

In 1950, Miami, which is the principal city of Dade County, had a population of 249,276, and Dade County had a total population of 495,084. By October 27, 1955, the date of the U.S. Special Census for Dade County, Miami's population had risen to 259,035, an increase of 3.9 per cent. Total population for Dade County on the same date was 703,777, or an increase of 42.2 per cent. The University of Florida population estimate for Dade County as of July 1, 1956, was 757,700. Examination of the increases in population in areas adjacent to Miami, including Hialeah and North Miami City, by census tract, indicates that the principal growth in Dade County has been to the north and west of Miami proper.

According to the 1948 U.S. Census of Business, there were 1,330 retail establishements in Broward County, of which 670 were situated in Fort Lauderdale. Total retail sales for the county in 1948 were

$94,336,000 and Fort Lauderdale, $59,921,000. According to the 1954 Census of Business, the total number of retail establishments in Broward County had risen to 2,227, with annual retail sales of $225,165,000. Of these, 1,167 establishments were located in Fort Lauderdale, with retail sales of $133,122,000. Likewise, in 1954, Fort Lauderdale had 128 wholesale establishments, of which 112 were merchant wholesalers with sales of $39,328,000, and 16 were wholesalers of other operating types with sales of $18,679,000. This compares with a total of 76 such establishments for the entire county in 1948. In addition, in 1954, there were 637 establishments in Fort Lauderdale engaged in selected services such as personal and business services, automotive repair service, amusement and recreation, and the operation of hotels, motels, and tourist courts, with total receipts of $18,461,000.

Because this matter has involved an allocations question, although such question is not, necessarily, separate from the adjudicatory questions resolved in the instant case, Gerico has pursued other lines of relief. In April, 1955, together with Storer Broadcasting Company, it petitioned the Commission for the issuance of a notice of proposed rule making to deintermix the Miami-Fort Lauderdale area, either completely or partially (i.e., partially by deleting all VHF channels, except Channel 4, which had been in operation since 1948). At the same time, Gerico sought to intervene in both the Channel 7 and Channel 10 proceedings and to cause posponement of decisions in each case pending resolution of the allocations problems raised by the aforesaid petition.

In November, 1955, however, the Commission denied Gerico's petition for rule-making and, in January, 1956, authorized the use of Channel 7. The questions, however, of the UHF-VHF dilemma were put off to the resolution of the genral rule-making proceeding initiated by the Commission in November, 1955 (Docket 11532) and the Channel 7 grant was made subject to the caveat that it was without prejudice to any action that the Commission might take as a result of

the over-all rule making proceeding instituted in Docket 11532. Gerico petitioned the Commission for reconsideration of its order granting final authorization for the use of Channel 7, and sought to have the Commission's denial of the rule-making petition as to Channels 7 and 10 reversed. The Commission denied the Channel 7 petition of Gerico in January, 1956, and that decision was appealed to this Court in Gerico Investment Company v. Federal Communications Commission, 1957, 99 U.S. App. D.C. 379, 240 F. 2d 410; together with the denial by the Commission of Gerico's petition to intervene in the Channel 10 proceeding.

Gerico's appeals were denied by the Court in January, 1957, Gerico Investment Company v. Federal Communications Commission, supra, on the basis that the Commission did not abuse its discretion in continuing to make VHF authorizations consistent with an existing Rule, (namely, the policy of the Commission that VHF and UHF assignments should be intermixed, as a matter of policy) while considering a change of the subsisting policy in another proceeding (Docket 11532).

On June 23, 1956, the Commission concluded its proceedings in Docket 11532. In the Order (13 RR 1571) the Commission found its prior policy of intermixture of VHF and UHF stations was invalid. In the same Order, the Commission instituted a number of so-called remedial proceedings involving the deletion or addition of VHF stations in certain selective communities (i.e., selective deintermixture) for the purpose of relieving against some of the harmful consequences of its earlier policy of intermixing VHF and UHF allocations in the same community. Insofar as the Miami area was concerned, the Commission instituted proceedings in a new Docket 11756 looking toward the addition of a fourth commercial VHF Channel Number 6, which plan was stated by the Commission to be more meritorious than other proposals to delete VHF channels from the same city.

Comments filed by Gerico and other persons in Docket 11756 in December of 1956. On February 8, 1957, the Commission made its

final authorization for the use of Channel 10 to which the instant appeal is directed. On April 29, 1957, the Commission issued an Order in Docket 11756 allocating Channel 6 to Miami for the purpose of offsetting "the loss in available UHF service(s)." The terms of the Order provided that any station constructing on Channel 6 must have its antenna situated at a point approximately twenty miles south of the city of Miami in order to comply with mileage spacing requirements from co-channel Station WDBO in Orlando. In its petition, however, Gerico had pointed out to the Commission, supported by a statement from a recognized aeronautical expert, that it would be impossible to erect a supporting structure for an antenna twenty miles south of Miami of sufficient height to permit a station to place a signal of required strength over the city of Miami, to comply with the Rules, without creating an excessively objectionable hazard to air navigation under existing criteria. Gerico also observed that location of a station at that point would not enable a new station to replace adequately the existing UHF service to be lost as a result of the VHF deintermixture of Miami. The Commission ignored these points in its Order and similarly did not thereupon issue a show cause order to WITV under Section 316 of the Act or require it to modify its license to specify Channel 6.

Gerico thereupon petitioned the Commission for reconsideration, urging it to permit the use of Channel 6 at the antenna farm area with a directional antenna to protect Channel 6, Orlando, from objectionable interference and that the Commission either issue to Gerico a modified license specifying Channel 6 or afford it the hearing required under Section 316 of the Act. No action has been taken by the Commission to date on Gerico's Petition for Reconsideration, nor has any license been issued to Gerico in that proceeding. Thereafter, on September 13, 1957, the Commission denied Gerico's Petition for Reconsideration in the Channel 10 proceeding and this appeal followed.

SUMMARY OF ARGUMENT

In authorizing the use of Channel 10 in the Miami - Fort Lauderdale area, which will cause the total destruction of the service of WITV, Channel 17, through ruinous economic competition, the Commission has unlawfully modified Gerico's license without affording to Gerico the required statutory hearing in advance of such modification. In holding that it has not modified Gerico's license, the Commission states that Gerico is not entitled to protection from destructive competition. This holding is based upon the theory of the Commission in the case of Southeastern Enterprises, 1957, 13 RR 139 to the effect that, even if public injury results from a loss of service, because such injury comes as a product of competition the Commission is powerless under the Communications Act of 1934, as amended, to relieve against it. The decision, however, is contrary to the decision of the Supreme Court in Federal Communications Commission v. Sanders Bros. Radio Station, 1940, 309 U.S. 470, 60 S. Ct. 693 and to other decisions of the court decided both before and after the Sanders case. The Commission's holding in Southeastern is further in error in that it purports to find a policy expressed in the Communications Act of 1934 that radio broadcasting is to follow the laws of completely free competition and, further, in that it eliminates the word "necessity", for all practical purposes, from the statutory standard of public interest, convenience and necessity by asserting that the Commission is not required to make a determination of need in passing upon applications for broadcast service.

The doctrine of the Commission in Southeastern has been amplified in Iredell Broadcasting Company, 1957, 13 RR 996, to the extent that the Commission also places reliance in policy statements contained in an earlier Commission decision The Voice of Cullman, 1950, 6 RR 164. Cullman holds, contrary to the practice of the Federal Communications Commission, itself, in rate making proceedings

under the common carrier provision of the Act, that the results of economic competition among broadcast stations is too conjectural for prediction and further holds, plainly contrary to fact, that the injury to the public in destruction of service under such circumstances is but temporary and is cured by the replacement of service through the facilities of the surviving station.

Even if the decision of the Commission authorizing the use of Channel 10 in Miami did not result in a modification of Gerico's license, the Commission nevertheless erred in failing to decide whether the destruction of Gerico's service and the injury to the public required denial of the application for Channel 10 in the light of the standard of public interest, convenience and necessity.

The Commission further erred in failing to apply the required statutory standard of fairness, efficiency and equity under Sec. 307(b) of the Communications Act of 1934, as amended, since this case involved the distribution of radio service among two separate communities and will result in the loss of its only television transmission service by Fort Lauderdale. Even in the Southeastern case the Commission recognizes this specific situation to be an exception to the doctrine there announced.

Finally, the Commission unlawfully denied Gerico's petition for a stay order to prevent the construction and operation of Channel 10 pending a hearing on the question of modification of Gerico's license, contrary to the provision of Sec. 316 of the Act and well settled principles of law.

ARGUMENT

I.

In Authorizing the Use of Channel 10 in Miami, the Commission has Unlawfully Modified Gerico's License and Has Denied Gerico the Hearing Required by Section 316 of the Communications Act of 1934, as Amended

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The principal question in this case is one of first impression and involves a problem of singular significance under the Communications Act of 1934, as amended. While the question is complex and difficult, it can be simply stated:

> Does the action of the Commission in making an authorization which, it is conceded, will result in the destruction of an existing licensed service constitute modification of the license of the existing station within the meaning of Section 316 of the Communications Act of 1934, as amended?

There are certain fundamental principles which may be disposed of at the outset. It is well settled that an existing license may be modified by indirect, rather than direct, action of the Commission. Federal Communications Commission v. National Broadcasting Co., Inc. (KOA), 1943, 319 U.S. 239, 63 S.Ct. 1035. That is, the making of an authorization by the Commission which results in the modification of an existing licensed service, inconsistent with the terms of the license or the rights of the licensee under such license, is nevertheless a modification within the meaning of Section 316 of the Communications Act of 1934, as amended, 66 Stat. 717, 47 U.S.C. s. 316, and the notice and hearing provisions of that section of the statute are controlling to the same extent as if the Commission had directly, by express order,

modified the existing license. Federal Communications Commission v. National Broadcasting Co., Inc. (KOA), supra; L. B. Wilson, Inc. v. Federal Communications Commission, 1948, 83 U.S. App. D.C. 176, 170 F.2d 793.

Section 316 of the Act, which is set forth in full in the Appendix to this brief, provides for a hearing by the Commission prior to modification of any existing license. Although the Commission has the authority to make modifications, it can do so only after hearing and only upon the required statutory findings of the public interest, convenience and necessity. (See appendix) Where it is claimed that an authorization would result in modification, and the claim is not frivolous, the Commission is required to afford the claimant a hearing on this preliminary question in addition to the hearing required prior to modification, itself. L. B. Wilson, Inc. v. Federal Communications Commission, supra. Even if the hearing procedures were not explicity a part of the statute, it is clear that such procedures would be required under general principles of due process of law. See Ashbacker Radio Corporation v. Federal Communications Commission, 1945,326 U.S. 327, 66 S.Ct. 148. In any modification, therefore, there are two questions presented: whether the act complained of does, in fact, or law, modify an existing license, whether directly or indirectly; and, whether, if so, the public interest, convenience and necessity, as found from facts adduced upon the record of an evidentiary hearing, justify the modification. See L.B. Wilson, Inc. v. Federal Communications Commission, supra, and Section 316 of the Act (appendix).

It is also clear that licenses may be modified by means other than through destruction by reason of electrical interference. The Commission is presently engaged in the so-called "Evansville" case in a show-cause proceeding under Section 316 of the Act which looks toward the deletion of an existing VHF service, directly, in order to protect UHF stations in the area from destructive or unlawful economic

competition. (See Evansville Deintermixture Proceeding, 1957, 22 F.C.C. 382) The proceeding also contemplates assignment of a new UHF frequency to the existing licensee to replace the deleted frequency. Applying ordinary principles of reason, and the doctrine of the KOA case, supra, it would seem that the Commission, similarly, could not accomplish indirectly through other authorizations, what it acknowledges it cannot accomplish directly without the formal procedures required by Section 316 of the Act. Therefore, it would seem to follow that the Commission's holding in the instant case that Gerico's license has not been modified because it does not involve a question of electrical interference is clearly erroneous. In any event, the principles set forth in the KOA and Wilson cases, supra, are general principles of law and would be applicable to modification for any cause.

It is within the above stated principles that this question must be decided. It is conceded that the authorization complained of will result in the destruction of Gerico's licensed service through ruinous competition. Gerico's claim that its license has been modified by the offending authorization is, therefore, not frivolous. Under the holding of the Wilson case, supra, the Commission erred in not granting to Gerico the hearing requested under Section 316 of the Act on the first of the two questions involved in any modification matter; namely, whether, in fact or law, a modification would result from the Commission's authorization.

If, however, the Commission could, without a hearing, determine preliminarily, that its questioned authorization would not result in the modification of Gerico's license, it nevertheless erred in its holding that such a modification had not occurred.

The question of what constitutes a modification of license is not extensively defined, either by decisions of the Court or the Commission.

We know, from decisions of the Court, that questions of electrical interference are applicable to questions involving the terms of a license. Federal Communications Commission v. National Broadcasting Co., Inc., (KOA), supra. We know, from practices of the Commission, that questions of deleting a service in order to foster competition, are applicable to questions involving both the terms and the rights under a license. Evansville Deintermixture Proceeding, supra; See WIRL Television Company v. United States, Case No. 13,768 (on appeal). But we do not know, with much definiteness, what constitutes modification of license for other causes.

Some insight into the problem may be gained from (1) a reading of the statute; (2) the Commission's reasoning in this case; and (3) an examination of the basic duties of a licensee and his correlative rights.

It is not necessary to go into an extended discussion of the precise nature of the right conferred upon a licensee of the Commission by virtue of its license. See L. B. Wilson, Inc. v. Federal Communications Commission, 1948, 83 U.S. App. D.C. 176, 170 F.2d 793, 798 - 802. Under Section 316 of the Act, the Commission may not modify a license except after hearing and upon the required statutory findings of public interest, convenience and necessity. It is clear, therefore, that, no matter how the right is defined, any licensee of the Commission has the right to the preservation and retention of his license and all of its lawful incidents unless the public interest, convenience and necessity require its modification. Thus, without going beyond the language of Section 316, itself, it clearly appears that a licensee has some nature of right in his license, at least to the extent that it may not be modified except for reasons which comport with the public interest, convenience and necessity. By looking to Section 316 of the Act, therefore, we find that the right under a license is defined by the public interest, convenience and necessity.

It is not merely by chance that the test for modifying a license should be the same test applicable to the granting of licenses in the first instance, nor that there should be careful hearing procedures embodied in the Act as to such modifications. Under Sections 307(a) and 309(b) of the Act, 48 Stat. 1083, 47 U.S.C. s. 307(a); 66 Stat. 715, 47 U.S.C. s. 309(b). The Commission can grant an original application for a license only upon a finding that the public interest, convenience and necessity will be served thereby. If it cannot make such a finding, it is required to afford the applicant a "full" hearing before it denies the application. See United States v. Storer Broadcasting Company, 1956, 351 U.S. 192, 202, 76 S. Ct. 763, 770. As this Court pointed out in the Wilson case, supra, it would constitute an unlawful and discriminatory application of the Act were the Commission to afford an applicant a hearing before denial of his original application, but deny a hearing if, subsequently, that license were modified. L. B. Wilson, Inc. v. Federal Communications Commission, supra.

In any event, it is plain that the right conferred upon a licensee by the original grant and which may not be taken away or modified, save upon required procedures, is defined, throughout, by the application of the standard of public interest, convenience or necessity, and that the right is defensible in the light of that standard.

Second, it must not be assumed that the standard of the public interest, convenience and necessity is empty, or a mere guide to the granting or denying of applications, and that once an application has been granted, the standard, somehow, becomes inapplicable to the license. The entire purpose of the Communications Act of 1934, as amended, is to administer the use of scarce frequencies in the public interest. See Federal Communications Commission v. National Broadcasting Co., Inc. (KOA), supra; Federal Communications Commission v. Sanders Bros. Radio Station, 1940, 309 U.S. 470, 60 S. Ct. 693. An application for license (i.e., construction permit)

constitutes a proposal to operate a broadcast facility, for the term of the license, according to the lights of the public interest, convenience and necessity. Not only does the standard apply to original applications and modifications of license, but to renewals and revocations of the same. See Sections 312, 307(a), 308(b) and 309, of Communications Act of 1934, as amended; 66 Stat. 716, 47 U.S.C. Sec. 312; 48 Stat. 1083, 47 U.S.C. Sec. 307(a); 66 Stat. 714, 47 U.S.C. Sec. 307(d); 48 Stat. 1084, as amended, 66 Stat. 714, 47 U.S.C. Sec. 308(b); 66 Stat. 715, 47 U.S.C. Sec. 309(a). The Act, therefore, imposes not only a duty upon the Commission to act upon applications and licenses in accordance with the statutory standard, but it thereby imposes a duty upon licensees to operate their stations in accordance with the same standard upon pain of revocation for failure to comply with any conditions of the license or for any causes or condition which would have caused denial of any application, ab initio. See Community Broadcasting Service, 1957, 13 RR 179. This is a positive duty of the licensee and correlative to the right granted under the license.

It is therefore seen that the right under a license is not merely defined by the statutory standard but conditioned upon its observance by the licensee. It might therefore be said that at least one right under a license is the right of the licensee to be free to operate the station so as to fulfill his obligation to provide a service which meets the standard of public interest, convenience and necessity and that an authorization which impairs that freedom, and prevents the fulfillment of the obligation would modify the license and would be doubly objectionable in that it would expose the licensee to the administrative sanctions of the Act.

It may therefore be said that the measure of a licensee's right under a license is, in one respect, the measure of his duty.

Some further insight into the question of the nature of the problem of modification can be gained by looking to the qualifications required of a licensee within the terms of the statute. Among other things, a licensee is required to be financially qualified in order to hold a station license. Communications Act of 1934, as amended, Section 308(b). See Scripps-Howard Radio, Inc. v. Federal Communications Commission, 1951, 89 U.S. App. D.C. 13, 189 F.2d 677, cert. den. 342 U.S. 830. Lack of financial qualification is a "condition" which, would justify denial of an application, ab initio, and which would justify revocation of license, or denial of an application for renewal, were the cause to arise subsequent to the date of original grant. In a situation such as the instant case, if the Commission's procedure is upheld, it will be possible for the Commission (1) to make an authorization without affording Gerico an opportunity to be heard which will concededly make it impossible for Gerico to continue operation; (2) place Gerico's license in jeopardy by reason of its inability to continue operation; (3) revoke Gerico's license for failure to comply with its terms and conditions; or (4) revoke or refuse to renew Gerico's license because it cannot, under the circumstances, any longer demonstrate financial qualification. Even in the face of these demonstrable effects upon Gerico's license, the Commission nevertheless contends that it has not modified Gerico's license through its instant authorization.

It is in the reasons given by the Commission, however, in explanation of its position that it has not modified Gerico's license that we find the real crux of the matter. The Commission states that:

> "Petitioner gratuitously assumes that among the privileges inherent in the grant of an instrument of authorization permitting the use and operation of a television broadcast station is the privilege to engage in the business enterprise of commercial broadcasting free from the operation of economic conditions unfavorable to the use of the facility with which a licensee is entitled to deal by virtue of such a grant. We are unable to find any support for such an assumption in the form of either

> statutory authority, or in the Commission's Rules and Regulations, or policy, or court decisions."

And, further:

> "We are thus called upon to determine the question of whether the petition of an existing television licensee, which alleges a modification of its license to have resulted from a grant of a construction permit for a proposed television broadcast facility, yet which concedes the grant thereof will not result in electrical interference to the use and operation of its broadcast facility, is entitled to a hearing pursuant to Section 316(a) of the Act. In our opinion, to state the question is to answer it, and that answer must be in the ngative."

The above, coupled with the holding in paragraph 20 of the order that the Ashbacker doctrine applies only to cases of electrical interference and "any application of that doctrine outside the area of that species of interference, as is herein sought, is clearly unwarranted," is the substance of the Commission's denial of Gerico's contention with respect to the modification of license question.

In essence, the Commission's holding rests upon the doctrine of Southeastern Enterprise, 1957, 13 RR 139, which essentially decided that the effect of competition, as a result of a new broadcast authorization, even where destructive of service, altogether, or destructive of the ability of either the new station or the existing licensee to render a service in the public interest, is not a factor which the Commission is legally permitted to consider as bearing upon the public interest, convenience and necessity. The doctrine was slightly modified in Iredell Broadcasting Co., 1957, 13 RR 996, to the extent that the Commission held that even if it could, lawfully, consider the effects of competition as a matter bearing upon the statutory standard, it would, nevertheless refuse, as a matter of policy, to consider such

matters, for the reasons stated in the much earlier case of Voice of Cullman, 1950, 6 RR 164. These cases represent current Commission policy on the question of destruction of service through ruinous economic competition and it is urged that they be considered carefully by the Court for, as will be seen, it is only the policy of those cases which can be urged as justification for the Commission's decision in this case.

As seen above, the Commission proceeds on the theory that if Gerico's license is effectively destroyed through ruinous competition, Gerico's license has, nevertheless, not been modified because that destruction occurred through competition. The Commission does not decide what Gerico's rights in its license are, nor does it decide whether total destruction of Gerico's ability to render service is a modification of license. It states, only, that Gerico is not entitled to protection from competition.

What the Commission has held, therefore, is that destruction of service through ruinous economic competition is not a matter affecting the public interest, convenience or necessity. For, as shown above, the right of a licensee in its license is coextensive with the public interest, convenience and necessity. If loss of service to the public through ruinous competition is a factor which bears upon the public interest, convenience and necessity, and is, therefore, a part of the licensing standard, it is, by definition, therefore, a factor bearing upon the right and obligation of a licensee under its license. In other words, if the result of competition is a ground for denial of a license, under the applicable standard, it is also basis for modification of an existing license under the same standard. The Commission has held in the cases cited above that competition, even where ruinous, is not a factor for consideration under the statutory standard in passing upon applications; it has, therefore, held in this case, that Gerico "gratuitously assumes" that it has a right in its license on the same basis. The issue, therefore, is squarely presented to this Court. If, under Southeastern,

and its companion cases, the Commission is correct in holding that it is not entitled, or required, to pass upon the question of loss of service occasioned by ruinous competition as a factor bearing upon the public interest, convenience and necessity on original applications for license, it is correct in holding that such questions are inapplicable to the destruction of service suffered by an existing licensee under a question of modification of license. If it is not correct, then its holding in this case must necessarily fall.

It is, therefore, to the Southeastern doctrine that we must look, in the final analysis, for final clarification of the problem involved in this case. In Southeastern considerable emphasis is placed upon the holding of the Supreme Court in Federal Communications Commission v. Sanders Bros. Radio Station, 1940, 309 U.S. 470, 60 S. Ct. 693. It is the justification, in essence, for the holding that (13 RR 146):

> "Issues 1 to 4 (the issues which raised the question of the effect upon the public of ruinous competition) seek to have the Commission determine whether broadcast competition is a good thing in Cleveland, Tenn. But Congress has decided that free competition shall prevail in the broadcast industry. Congress has not given us the power to decide that in some communities it shall prevail and in other communities it shall not prevail. If, in consideration of the evidence elicited under issues 1 to 4, we should determine that the competition of the new applicant would result in public injury in the area of Cleveland, Tenn., we would still have no power to relieve against it. Congress having decided that free competition is a good thing,it is not for us to decide otherwise."

In reaching this conclusion the Commission has indulged in numerous faulty assumptions, misinterpreted existing law, and misapplied the statutory standard. The Southeastern case involved a protest under Sec. 309(c) of the Act by an existing radio station in the area of Cleveland, Tennesee, to a grant by the Commission, without

hearing, of a construction permit for a new station to operate in the same community. In Southeastern it was urged by the existing licensee that the operation of the second radio station in a community of that size, with limited economic resources, would result in the impairment of the ability of the existing station or of the proposed station to provide a service to the public in the public interest or cause the failure altogether of one or the other or both of the stations. The Commission was asked to determine whether these consequences, or any of them, would be in the public interest. After lengthy hearings and the reception of an extensive evidence on the economic potential of the Cleveland, Tennessee, area and other related matters, the Commission issued its decision in Southeastern Enterprises, as aforesaid.

It is to be kept in mind that protection from competition, as such, was never an issue in the Southeastern case and has never been an issue in this case. Economic injury, as such, through loss of revenue, was not an issue in the Southeastern case and is not an issue here. The question for decision there, as here, was whether it was in the public interest, convenience or necessity to make an authorization which would result in the impairment of the ability of an existing licensee to render a service in the public interest or, as here, result in the deletion of an existing service altogether with the consequent and obvious effect upon the public. The Commission, however, has seized upon language from the decision of the Supreme Court in FCC v. Sanders Bros. Radio Station, 1940, 309 U.S. 470, 473; 60 S. Ct. 693, 696 that:

> "resulting economic injury to a rival station is not, in and of itself, and apart from considerations of public convenience, interest, or necessity, an element the [Commission] must weigh and as to which it must make findings in passing on an application for a broadcasting license"

as the principal authority for its position and has rejected as obiter dicta the words of exception in the same decision defining the general rule

stated above that (309 U.S. 470, 475, 60 S. Ct. 693, 698):

> "this is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations, - the existing and the proposed - will go under with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service."

The Supreme Court thereupon concluded "that economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether it would grant or withhold a license." Id.

The Commission's decision, insofar as it purports to follow the Sanders case, is plainly in error. First, it misapplies the specific language of the court's holding, namely, that economic injury apart from questions of loss of service to the public, is not a question for resolution by the Commission under the statutory standard of public interest, convenience and necessity, in reality, an exception to those situations in which, as the court clearly points out, such competition would have an adverse effect upon service to the public. The Commission, however, reads Sanders to mean that the Commission lacks authority to act even where it is clearly demonstrable that the competition complained of will cause destruction of existing service. It is plain, therefore, that the Commission's decision is in fact contrary to Sanders.

Having misconstrued the Sanders case, the Commission then purports to find some evidence of a congressional intent in the Communications Act to leave broadcasting to the caprice of unfettered

competition. Although apparently recognizing that there may be certain kinds of competition which might be restrained by the Commission or which, indeed, would be repugnant to the standard of the public interest, convenience and necessity (see 13 RR 147), the Commission apparently does not believe that a broadcaster, although held to a public interest standard and a duty under the Act, can colorably claim protection from destructive competition. In support of its position the Commission points to a definition in Sec. 3(h) of the Communications Act which states that for the purposes of the Act a "person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." Communications Act of 1934, as amended, Sec. 3(h) 48 Stat. 1065, as amended, 47 U.S.C., Sec. 153 (h), and culls from the Sanders decision the statement, which amplified the court's holding that competition in and of itself without reference to injury to the public is not a factor for consideration under the standard, to the effect that "thus, the Act recognizes that the field of broadcasting is one of free competition." Surely the Commission must be aware that competition is in fact regulated on every hand without the imposition of common carrier controls on private enterprise and it has recently been reminded by the Supreme Court that the finding "that there is a national policy favoring competition cannot be maintained today without careful qualification. It is only in a blunt, undiscriminating sense that we speak of competition as an ultimate good." Federal Communications Commission v. RCA Communications, 1953, 319 U.S. 90, 73 S. Ct. 998. Even it it can be reasoned that the degree of impairment of ability is the touchstone of the public interest in these matters, no question exists in this case as to the presence of injury to the public in view of the undisputed fact that the Commission's authorization will result in the final and total destruction of an existing service to the public.[1] Moreover, the field of broadcasting is one of limited access by

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[1] That Gerico's proposed and existing service meets the public interest standard is established by the original grant of the Commission of a construction permit and its subsequent action in issuing to Gerico a license under the same standard.

its very nature. It cannot freely be entered by any person who merely desires to enter the field. It is limited because of the shortage of available frequencies. It is limited because stations cannot be operated so close together as to cause objectionable electrical interference. It is limited, particularly in television, because of the substantial financial investment required to construct and operate the station, and it is further limited by express statutory requirements placed upon applicants, such as that of citizenship. More than this, however, it is limited by the specific statutory standard itself, namely, that any applicant for any broadcast facility must first demonstrate not only that he is qualified but that the service he proposes will meet the standards of public interest, convenience and necessity. The notion, therefore, that broadcasting is a field of free competition is not merely inconsistent with an intelligent understanding of the nature of that term itself, but totally inconsistent with the fact that this is a regulated field of limited access.[2] In any event, the Commission's decision in Southeastern ignores the distinction between competition, as such, and the public interest standard, so clearly defined by the court in Yankee Network, Inc. v. Federal Communications Commission, 1939, 71 App. D.C. 11, 22, 107 F. 2d 212, 223:

> "Just as a monopoly -- which may result from the action of the Commission in licensing two few stations -- may be detrimental to the public interest, so may destructive competition, effected by the granting of too many licenses. The test is not whether there is a monopoly, on the one hand, or an overabundance of competition, on the other hand, but whether the granting or denying of the application will best serve the interest of the public." (emphasis supplied).

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2 The contention of the Commission in Southeastern that if it decided to deny an application on the basis of injury to the public from destructive competition it would be required to impose some form of common carrier control over the existing licensee is fallacious. The Commission reasons that it would be required to supervise the operation of the existing licensee to make sure that the licensee rendered the "service that we found was necessary" and maintains "an effective and efficient operation to that end" (13 RR 151). But the Commission decides among qualified applicants on the basis of which would provide a superior service in every comparative hearing. To date, however, the Commission has never felt the obligation to supervise the resulting service to prevent "an avoidance of our determination" (13 RR 151) other than through its ordinary control over the operation of any licensee through its procedures on revocation and renewal. The further statement by the Commission that "restriction of competition is a corollary of exclusivity, and exclusivity is tolerable only by the application of public utility concepts or techniques" (13 RR 151) cannot stand as justification for the Commission's holding in the case for, as seen, the field, by its very nature, is one of unlimited access and hence not susceptible to the ordinary form of free competition.

Where the issue has been clearly presented in the context of the public injury which would result from loss of service or the inability of a licensee to provide adequate service as a consequence of destructive competition, the courts both before and after Sanders have generally stated that such consequences should be considered by the Commission under the public interest standard. See WOKO, Inc. v. Federal Communications Commission, 1939, 71 App. D.C. 228, 109 F. 2d 665; Tri-State Broadcasting Co. v. Federal Communications Commission, 1939, 71 App. D.C. 157, 107 F. 2d 956; Tri-State Broadcasting Co. v. Federal Communications Commission, 1939, 68 App. D.C. 292, 96 F. 2d 564; Pulitzer Publishing Co. v. Federal Communications Commission, 1937, 68 App. D.C. 124, 94 F. 2d 249; Great Western Broadcasting Ass'n. v. Federal Communications Commission, 1937, 68 App. D.C. 119, 94 F. 2d 244; Democrat Printing Co. v. Federal Communications Commission, 1952, 91 U.S. App. D.C. 72, 202 F. 2d 298. But see Stahlman v. Federal Communications Commission, 1942, 75 U.S. App. D.C. 176, 126 F. 2d 124. The Southeastern case is also erroneous to the extent that it holds that the Commission is not required to make a determination of need for service under the statutory standard of public interest, convenience and necessity. In effect the Commission writes the word "necessity" out of the standard altogether. Of course, the Commission claims that it has for many years now refused to consider need as a factor in passing upon broadcast applications. This, however, is demonstrably untrue. In every comparative hearing the Commission examines the proposals of the applicants to determine which will more closely meet the needs of the area to be served. The comparative factors of civic participation, integration of ownership and operation, local residency and the like are said by the Commission to demonstrate continued sensitivity on the part of an applicant to the needs of the community it serves. And until a recent Amendment the Commission's rules specifically provided for a showing of need for secondary service in certain types of interference cases. In actuality, the Commission assumes a need for a new station

where no contrary facts exist, but where the question of need clearly arises, as here, it would seem clear that the Commission cannot avoid its statutory responsibility to decide the question.[3]

Following the issuance of the Southeastern decision the Commission in Iredell Broadcasting Company, 1957, 13 RR 996, where a similar question was presented and hearings had been held on the so-called "economic injury" issue added as a further ground for its refusal to consider this question that as a matter of policy it would not inquire into public injury resulting from destructive competition even if it had the authority to do so under the Act. In Iredell the Commission followed an earlier decision in The Voice of Cullman, 1950, 6 RR 164. Cullman stands for two propositions. First, the decision holds that the results of competition are conjectural and cannot be foreseen.

The Commission said, 6 RR 170:

> "The possibilities are numerous, and since they lie in the future and stem from the interaction of individual purposes, energies, perseverance, and resourcefulness in a dynamic situation over a period of time, the ultimate results, and even more the effect of any particular result upon the service rendered the public cannot be predicted. Detailed information of the present business situation obtained at a hearing would not make prediction substantially more possible."

Cullman also stands for the proposition that the injury to the public through loss of service would only be temporary in view of the fact that the surviving station would "replace" the service of the presently existing station.

It does not need the citation of authority to disclose the error in the first proposition. Matters of competition, the economic conditions

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3 The court, of course, is familiar with those cases in which the Commission decides as to the comparative need for service between two communities. See e.g. Federal Communications Commission v. Allentown Broadcasting Company, 1955, 379 U.S. 358, 75 S. Ct. 855. Thus even if need can be assumed where both stations operate in the same city it cannot thus be assumed where they would operate in different communities. The relative need of the two communities is specifically a factor in this case. See Sec. III, infra.

of a given area, the ability of a customer to pay, the availability of adequate sources of income are all matters commonly disposed of not only by the Federal Communications Commission but by other Government agencies in dealing with such matters as rate making, and while forecasts for the future based upon presently existing economic conditions cannot be absolutely certain it is common experience that such predictions can be made with reasonable certainty. The second point in Cullman is equally erroneous and stems from the Commission's failure to understand the nature of its obligation to make grants only upon a finding of public interest, convenience and necessity. In any event, as the Commission appears to recognize in Southeastern where it is established that a new authorization will result in the destruction of an existing service it would be required to determine the specific need for the new authorization if it is required to consider the economic destruction of the existing station at all.

Even if the Commission's decision in Southeastern that it has no power to consider competition in the field of broadcasting, is valid, it has nevertheless failed to act on its own principle in other cases. In the television field, for instance, the Commission, since June of 1956, has been engaged in a series of rule making proceedings looking toward adjusting the competitive difference between television stations in order to assure more service to the public. Whether the Commission views its action as increasing the opportunities for more effective competition among stations, as in its television proceedings, or controlling the allocation of facilities because of inequities in the competitive ability of broadcasters in certain areas, the result is, nevertheless, the same and stems from the Commission's clear recognition in those cases of its duty to regulate broadcasting in the interests of providing more and not less service. Two such cases are presently before the

court on appeal. In the Peoria case, WIRL Television Company v. United States, Case No. 13,768, the Commission has attempted to prevent the establishment of a new VHF station in Peoria because of the adverse effect it would have on the ability of existing UHF stations to compete, which fact would result in limiting the number of television services available in Peoria. See also Evansville Television Inc. v. United States, Case No. 14,046.

From the foregoing it is seen that the Southeastern doctrine is plainly in error and that questions of loss of service resulting from destructive economic competition must be considered by the Commission under the standard of public interest, convenience and necessity. If this injury to the public can be grounds for denial of an application under the public interest standard, it would seem to follow that the licensee whose ability is impaired by reason of such competition has sufficient right in his license to entitle him to a hearing under Sec. 316 of the Act prior to the modification of his license.

II.

In Any Event The Commission Was Required Under Section 309 Of The Act To Pass Upon The Public Injury Question in Authorizing The Use Of Channel 10

Even if it should be held that Gerico's license was not modified by the Commission's action in granting an authorization for the use of Channel 10, the Commission nevertheless should have decided whether the public interest would be served by the deletion of Gerico's service when it passed upon the Channel 10 applications. It is the Commission's duty to make decisions based upon the public interest and it may not ignore vital elements bearing on that determination. Clarksburg Publishing Co. v. Federal Communications Commission, 1955, 96 U.S. App. D.C. 211, 255 F. 2d 511.

III.

The Commission's Decision is Invalid For The Reason That The Commission Has Failed To Apply The Required Statutory Standard Of Fairness, Efficiency and Equity Under Section 307(b) Of The Act.

Section 307(b) of the Communications Act of 1934, as amended, 48 Stat. 1083, 47 U.S.C. s. 307(b), requires, in mandatory terms, that the Commission in passing upon any application for "licenses, and modifications and renewals thereof," make such distribution of radio service among states and communities as to provide a "fair, efficient and equitable distribution" to each of the same. The standard to be applied by the Commission is that of fairness, efficiency and equity as contrasted with the standard of public interest, convenience and necessity set forth in Sections 307(a) and 309 of the Act.

Notwithstanding the fact, conceded by the Commission, that the authorization here involved will result in the deletion of another broadcast service assigned to a different community, the Commission has failed to make any findings or to receive any evidence, whatsoever, upon which the required statutory determination could be made. The failure of the Commission to make required statutory findings renders the decision a nullity.

For the purpose of applying Section 307(b), it is necessary to understand the fundamental difference in concept between a transmission service and a reception service. A transmission service is that service which is supplied by a radio or television station to the community to which it is assigned as an outlet for local self-expression. A reception service is that service which is provided by a radio or television station to any place within its service area and it is the service which is received by listeners or viewers. These

distinct concepts have been a part of the words of art "Radio Service" since the development of communications regulation itself and indeed are the foundation for the priorities established by the Commission in making television allocations originally under the Sixth Report and Order. (1 RR (Part 3) pp. 91: 620-691) Those priorities were:

> "(1) To provide at least one television service to all parts of the United States.
>
> (2) To provide each community with at least one television broadcast station.
>
> (3) To provide a choice of at least two television services to all parts of the United States.
>
> (4) To provide each community with at least television broadcast stations.
>
> (5) Any channels which remain unassigned under the foregoing priorities will be assigned to the various communities depending on the size of the population of each community, the geographical location of such community, and the number of television services available to such community from television stations located in other communities. (para. 63, underscoring supplied)."

Applied to this case, Channel 17, under the meaning of Section 307(b) of the Act, provides a transmission service for Fort Lauderdale, and a reception service for Miami, Fort Lauderdale and other communities within its service area. It is a station for the purpose of priority 2 and a service for the purpose of priority 3. Channel 10 provides a transmission service for Miami and a reception service for Miami, Fort Lauderdale and all communities within its service area. It is a Miami station under priority 2 and a service under priority 3.

The effect of the Commission's decision, therefore, has been to deprive Fort Lauderdale of its only transmission service or "station" within the meaning of the second priority while providing Miami with its third such transmission facility or "station" within the meaning of

the second priority. There is, therefore, a prima facie question existing which must, as a matter of law, be resolved by the Commission in passing upon this application under the requirements of Section 307(b) of the Act.

Even if it be argued that the Commission made its original assignments on the basis of Section 307(b) of the Act, it does not therefore follow that the Commission can now ignore the Section in passing on the Channel 10 application. For when the Commission assigns a frequency for use in a specific community, as was accomplished under the Table of Allocations, Rule 3.606, 47 C.F.R. s. 3.606, it has not distributed radio service as such, for a frequency may remain assigned forever without use. Clearly the thing which is accomplished in the reservation of frequencies for specific communities is the allocation or distribution of potential service. If this be true and actual service thereafter authorized disturbs or upsets the original scheme it would again appear that Section 307(b) must be brought to bear on the question. If, as in this case, the actual authorization of the third transmission facility in Miami precludes the maintenance of a first transmission service in Fort Lauderdale, then it necessarily follows that a Section 307(b) question is involved both because it disturbs the underlying statutory scheme of potential service and the existing facts of actual service.

In its decision the Commission appears to predicate its statement that there is no 307(b) question in this case upon the mistaken notion that Gerico somehow is attacking the underlying principle of allocation of frequencies according to a table of assignments. As seen from the foregoing, however, this is not true. Nothing said by Gerico is contrary to the purpose for which a table of allocations was adopted nor is the point raised by Gerico contrary to any of the principles underlying the specific assignment of frequencies with the table itself.

To the contrary, Gerico has merely requested that the Commission respond to its manifest statutory duty to resolve questions of the distribution of radio service among communities according to the statutory standard under Section 307(b) of the Act.

It is no answer to Gerico's contentions to state, as the Commission does, that the Channel 10 proceeding is an adjudicatory proceeding and not an allocations proceeding; that the 307(b) question is, therefore, not appropriate for resolution therein. Although the Commission may proceed to make assignments of frequencies by means of a fixed table of allocations, Logansport Broadcasting Corp. v. United States, 1954, 93 U.S. App. D.C. 342, 210 F. 2d 24, it may also formulate its rules in ad hoc adjudicatory proceedings, Securities and Exchange Commission v. Chenery Corp. 1947, 332 U.S. 194, reh. den. 332 U.S. 783. The Commission, therefore, has the authority to consider legislative matters in its adjudicatory proceedings. Moreover, if, as in this case, the effect of the Commission's decision in an adjudicatory proceeding is to cause a change in the Rule or to result in what prima facie is unfair, inefficient, inequitable distribution of radio service as between two communities, then the question is raised by the nature of the proceeding itself and can only be resolved under the Communications Act of 1934, as amended, by reference to the statutory standard of Section 307(b) of the Act. To hold to the contrary would mean that although the Commission is bound by the requirements of Section 307(b) of the Act in making assignments of ab initio it may nevertheless change those assignments or make distribution of facilities inconsistent with the assignments or contrary to requirements of law, notwithstanding the mandatory provision of Section 307(b) of the Act, merely because the action has been taken in adjudicatory proceedings rather than through rule-making.

Finally, the Commission itself has recognized in the Southeastern case (Southeastern Enterprises, 1957, 13 RR 139) that loss of service

through economic destruction would be considered if it involved the distribution of service among states and communities, that is, if it involved a 307(b) question.

IV

The Commission's Denial of Gerico's Request For A Stay Order Directed Against Construction Of The Channel 10 Facility Was Contrary To Law

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As a part of its petition for reconsideration and rehearing, Gerico requested the Commission to issue a stay order staying the construction of the Channel 10 facility pending the resolution of the questions raised by Gerico. In view of the seriousness of the question involved and the further fact that the operation of Channel 10 would result in the deletion of an existing broadcasting service to the ultimate detriment of the public, the Commission had a plain duty to resolve that question speedily for "agency inaction can be as harmful as wrong action." American Broadcasting Co. v. Federal Communications Commission, 1951, U. S. App. D.C. 191 F. 2d 493.

The very nature of Gerico's petition called for the imposition of a stay order, if only during the period while this issue was being resolved, for as a matter of law, Gerico is entitled to show cause procedures specified by Sec. 316 in advance of the actual modification of its license by any act of the Commission. Communications Act of 1934, as amended, Sec. 316, 66 Stat. 717, 47 U.S.C. Sec. 316; Federal Communications Commission v. National Broadcasting Co., Inc. (KOA), 1943, 319 U.S. 239, 63 S. Ct. 1035. And where a substantial question has been raised as to whether the Act complained of would in law constitute a modification of a license this question similarly is required to be heard by the Commission in advance of

its actual modification of the license. L. B. Wilson, Inc. v. Federal Communications Commission, 1948, 83 U. S. App. D.C. 176, 170 F. 2d 793.

If the court should remand this case on the Section 316 question, it should, consistent with the principle of the KOA and Wilson cases, reverse the Commission's order with respect to the denial of the stay order and under Section 10(e) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C., Sec. 1009(e), direct the Commission to stay the construction of Channel 10 and restore the parties to their status quo. It is only in this manner that the statutory right of Gerico under Section 316 of the Act can be protected.

CONCLUSION

For the reasons herein stated, it is submitted that the actions of the Commission from which appeal is taken are arbitrary, capricious and contrary to law, and the case should be reversed and remanded and the Commission's order authorizing the use of Channel 10, Miami, set aside with instructions to the Commission to stay the construction and operation of Channel 10 pending an appropriate show cause proceeding to determine whether Gerico's license should be modified, and such other and further relief as may be deemed meet and proper in the premises.

Respectfully submitted,

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APPENDIX

Administrative Procedure Act, Sec. 10(e), 60 Stat. 243, 5 U.S.C., Sec. 1009(e):

Scope of Review

(e) So far as necessary to decision and where presented the reviewing courts shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, Sec. 10, 60 Stat. 243.

Communications Act of 1934, as amended, 48 Stat. 1083, 47 U.S.C., Sec. 3(h):

Definitions

Sec. 3. For the purposes of this Act, unless the context otherwise requires --

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Communications Act of 1934, as amended, 48 Stat. 1083, 47 U.S.C. Sec. 307(a); 66 Stat. 714, 47 U.S.C. Sec. 307(d); 48 Stat. 1083, 47 U.S.C. Sec. 307(b):

Allocation of Facilities; Term of Licenses

Sec. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of

such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405, the Commission shall continue such license in effect.

Communications Act of 1934, as amended, 48 Stat. 1084, as amended, 66 Stat. 714, 47 U.S.C. Sec. 308(b):

Applications for Licenses; Conditions in License for Foreign Communication

Sec. 308. (b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements

Communications Act of 1934, as amended, 48 Stat. 1083, 47 U.S.C., Sec. 3(h):

Definitions

Sec. 3. For the purposes of this Act, unless the context otherwise requires --

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

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such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405, the Commission shall continue such license in effect.

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of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

Communications Act of 1934, as amended, 66 Stat. 715, 47 U.S.C. Sec. 309(a); 48 Stat. 1083, 47 U.S.C. Sec. 309(b):

Action Upon Applications; Form of and Conditions Attached to Licenses

Sec. 309. (a) If upon examination of any application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. The parties in interest, if any, who are not notified by the Commission of its action with respect to a particular application may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the

basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant.

Communications Act of 1934, as amended, 66 Stat. 716, 47 U.S.C. Sec. 312:

Administrative Sanctions

Sec. 312. (a) Any station license or construction permit may be revoked --

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States; and

(5) for violation of or failure to observe any cease and desist order issued by the Commission under this section.

(b) Where any person (1) has failed to operate substantially as set forth in a license or (2) has violated or failed to observe any of the provisions of this Act or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States the Commission may order such person

to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

(e) The provisions of section 9(b) of the Administrative Procedure Act which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order.

Communications Act of 1934, as amended, 66 Stat. 717, 47 U.S.C. Sec. 316:

Modification by Commission of Construction Permits or Licenses

Sec. 316. (a) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue: Provided, That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

MORTIMER W. LOEWI, being first duly sworn deposes and states as follows:

1) Gerico Investment Company is a Florida Corporation composed of Stock Holders who are long time residents of Ft. Lauderdale and prominent in business, social and civic activities in that community. From the beginning, the purpose of the Gerico group was to construct and operate a Ft. Lauderdale Television Station.

2) The Deponent is the President, director and the General Manager of the Station. Together with Allen B. DuMont, he founded the Allen B. DuMont Laboratory, Inc. in 1935 and later the Allen B. DuMont Company opened the first Television Network by joining by cable the Washington Station WTTG with their New York Station WABD. Until his resignation in 1953, he was Executive Assistant to the President. As a communication expert, he served with the U.S. Navy as a Commander from 1942 through 1944, specializing in radio and radar.

3) WITV has operated in Ft. Lauderdale on a Competitive basis with a pre-freeze VHF Station, a competitive UHF Station and a second VHF Station. It's revenue has been derived 80% or more from local sources and the balance from Network, National and Regional sources, although it has been our experience that for a Station similarly situated, if VHF, revenues generally approximate 60% National, Regional and Network and 40% local. In addition, as much as 80% of our local revenue has been derived from the sale of time adjacent to Network programs. At the present time, all Commercial Network programs of the American Broadcasting Company are being carried by it's Miami affiliate, Channel 10.

4) Attached hereto is a schedule showing the operating revenues, costs and profit or loss during the past 24 months for WITV. It is self-explanatory. It may be noted, however, that the expense catagory did not decline during this period, showing that WITV maintained it's efforts to compete after the commencement of service by Channel 10.

5) Absent relief from the court or from the Commission, WITV cannot continue to operate in the Miami, Ft. Lauderdale area. Since August, 1957 Gerico has continued to provide a Television service in the confident belief that the Commission would act upon one or more of the several proposals pending before it and upon the conviction that the public should not be deprived of a valuable Television service in the interim.

Respectfully submitted,

/s Mortimer W. Loewi

MWL/elc

WITV GENERAL MANAGER

Subscribed to and sworn before me
this 20th day of December, 1957

Edna Crawshaw

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	SALES	EXPENSES	MONTHLY PROFIT OR LOSS	ACCUMULATIVE TOTAL PROFIT OR LOSS
1955				
DEC.-1955	53,345.19	43,092.22	10,252.97	10,252.07
JAN.-1956	61,891.96	45,773.68	16,118.28	26,371.25
FEB.	57,230.91	47,196.33	10,034.58	36,405.83
MAR.	69,051,06	48,190.61	20,860.45	57,266.28
APR.	66,536.42	47,659.71	18,876.71	76,142.99
MAY	63,473.28	47,433.69	16,039.59	92,183.58
JUNE	42,236.98	43,196.37	(959.39)	91,223.19
JULY	45,026.49	44,761.53	264.96	91,448.15
AUG.	38,703.48	46,802.74	(8,099.26)	83,388.89
SEPT.-Channel 7 started Operation.	38,890.91	46,159.20	(7,268.29)	76,120.60
OCT.	38,915.05	46,373.79	(7,458.74)	68,661,86
NOV.	53,949.61	50,598.28	3,351.33	72,013.19
TOTALS	629,251.34	557,238.15		
DEC.-1956	43,902.63	44,391.73	(489.10)	(489.10)
JAN.-1957	56,980.23	54,246.76	2,733.47	2,244.37
FEB.	52,540.82	48,840.82	3,700.00	5,944.37
MAR.	52,801.97	52,488.37	313.60	6,257.97
APR.	50,220.77	48,379.12	1,841.65	8,099.62
MAY	39,950.35	50,139.52	(10,189.17)	(2,089.55)
JUNE	41,674.33	51,752.33	(10,078.00)	(12,167.55)
JULY	31,595.98	43,549.06	(11,953.08)	(24,120.63)
AUG.-Channel 10 started Operation.	18,015.36	45,111.82	(27,096.46)	(51,217.09)
SEPT.	17,340.89	42,982.78	(25,641.89)	(76,858.98)
OCT.	13,937.08	42,958.36	(29,021.28)	(105,880.26)
NOV.	14,342.99	44,807.83	(30,464.84)	(136,345.10)
TOTALS	433,303.40	569,648.50		

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BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,179

United States Court of Appeals
For the
District of Columbia Circuit
FILED MAR 6 1958
Joseph W. Stewart
CLERK

GERICO INVESTMENT COMPANY, Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee

PUBLIC SERVICE TELEVISION, INC., Intervenor

ON APPEAL FROM ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

WARREN E. BAKER,
General Counsel,

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RUTH V. REEL,
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Federal Communications
Commission
Washington 25, D. C.

QUESTIONS PRESENTED

The questions presented, as stipulated by the parties, are set forth in appellant's brief, pp. (i)-(ii).

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IN THE UNITED STATES COURT OF APPEALS
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No. 14,179

GERICO INVESTMENT COMPANY, Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee

PUBLIC SERVICE TELEVISION, INC., Intervenor

ON APPEAL FROM ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

COUNTERSTATEMENT OF THE CASE

In this case appellant (here called Gerico), the licensee of a UHF television station at Fort Lauderdale, Florida, again complains of the Commission's action in granting a VHF construction permit in nearby Miami.[1/] The Court dealt with one aspect of this UHF-VHF controversy and passed on substantially the same issue in Gerico Investment Company v. Federal Communications Commission, 99 U.S. App. D.C. 379, 240 F. 2d. Since Gerico's Statement of the Case intermingles the questions in this appeal with matters previously considered by the Court and rule making proceedings not yet before the Court, we restate

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1/ The same Commission order is also before the Court in Case No. 14,170, WKAT, Inc., v. Federal Communications Commission. On October 28, 1957, the Court ordered that record incorporated by reference into the record in this case. Unlike WKAT, Gerico does not challenge the Commission's choice among applicants in the underlying comparative proceeding, but seeks to keep the channel from being awarded to any applicant at all.

the case.

Background

As set forth in the Court's earlier Gerico decision (99 U.S. App. D.C. at 381, 240 F. 2d at 412), the Commission in its Sixth Report and Order of April 1952 (47 CFR 3.606, 1 Pike & Fischer, R.R. 53:602 et seq.[2/] establishing a nationwide Table of Assignments for television stations, allocated two UHF channels to Fort Lauderdale and three commercial VHF and two UHF channels to Miami, approximately 25 miles to the south. When Gerico secured its construction permit for UHF Channel 17 in Fort Lauderdale on July 30, 1952, Miami VHF Channel 4 was already in operation. Competing applications for VHF Channels 7 and 10 were designated for comparative hearings in 1952.

In April 1955, while these comparative hearings were still pending, Gerico filed a petition for deintermixture, alleging that operations on the VHF channels would subject its UHF operations to ruinous competition, and requested the Commission to stay the Channel 7 and 10 proceedings pending action on the deintermixture petition. On November 10, 1955, the Commission denied this and various similar petitions for deintermixture in other communities, on the ground that the UHF-VHF problem was nationwide in scope, could not be resolved on a local basis, and should be made the subject of a general rule making proceeding (13. R.R. 1511, 1522). In the interim, the Commission decided not to freeze VHF grants (13 R.R. 1517).

2/ Hereafter cited as_____R.R._____.

Simultaneously, on November 10, 1955, the Commission instituted a new general rule making proceeding to receive suggestions for a nationwide improvement of the allocation table (Docket 11532; 20 F.R. 8501; 1 R.R. 53:573-575).

Gerico then petitioned for reconsideration of the denial of its deintermixture petition, and also sought to intervene in and stay both the Miami Channel 7 and 10 adjudicatory proceedings pending the outcome of the general rule making proceeding (Docket 11532) and final action on its deintermixture petition. The Commission thereafter on January 20, 1956, denied all the foregoing requests including reconsideration of its deintermixture proceeding and granted a construction permit in the Channel 7 comparative hearing. No action was taken at that time in the Channel 10 proceeding. Gerico appealed to this Court, which sustained the Commission's actions, including denial of intervention or stay of the Channel 10 proceeding and its decision to make the Channel 7 grant before reaching a final decision in the pending deintermixture proceedings. Gerico Investment Company v. Federal Communications Commission, 99 U.S. App. D.C. 379, 240 F. 2d 410.

Gerico now appeals from the Commission's action in granting a construction permit in the Channel 10 proceeding on February 8, 1957, before a final determination in acting upon its petition for reconsideration of new rule making proceedings involving the Miami area. Before turning to the issues in the instant appeal, we briefly summarize the progress of the rule making pro-

ceedings to date.

In its Report and Order in the general rule making proceeding (Docket 11532), issued on June 26, 1956, the Commission decided to study the feasbility of a gradual transition to an all UHF system as a possible solution to the nationwide UHF-VHF problem (13 R.R. 1571). As an interim measure, the Commission instituted rule making proceedings for revision of the Table of Assignments in some 13 communities, including Miami (13 R.R. 1581-1583). The Miami proceeding (Docket 11756) looked toward the addition of a fourth commercial VHF Channel 6, which the Commission deemed more meritorious than deletion of the existing VHF channels (13 R.R. 1583). Gerico filed comments in this proceeding, proposing that VHF Channel 6 be allocated to Fort Lauderdale and operate from a so-called "antenna farm" located between Fort Lauderdale and Miami (15 R.R. 1638a, 1640,). The Commission's Report and Order, issued on April 29, 1957, allocated VHF Channel 6 to Miami to compensate for the probable loss of UHF service (with the antenna for such a station at a site south of Miami in the Miami-Fort Lauderdale area) and rejected Gerico's Fort Lauderdale proposal as being not in acco cordance with minimum spacing requirements (15 R.R. 1638a, 1640-1642). Gerico thereupon petitioned the Commission for reconsideration, again urging that Channel 6 be allocated to Fort Lauderdale and further requesting the Commission either to modify Gerico's license to specify operation on this VHF Channel or accord it a hearing under Section 316(a) of the Act (App. Br. p. 12).

To date the Commission had not acted on Gerico's petition for reconsideration and the instant appeal presents no issue as to the propriety of the Commission's actions in this rule making proceeding.

The instant appeal

As previously noted, the Commission granted a construction permit to Public Service Television, Inc., in the Channel 10 adjudicatory proceeding on February 8, 1957 (R. 4436-4541). Gerico thereafter (March 11, 1957) filed a petition for reconsideration, rehearing, and request for stay of construction pending final determination of the Miami rule making proceeding (R. 7891-7911). In brief, Gerico contended that the Commission in its decision in Channel 10 case failed to make statutory findings required by Section 309(a) and 307(b) of the Act because it made no determination as to the comparative need for the proposed service (VHF Channel 10) as against the existing service (Gerico's UHF Channel 17) or as to whether the grant complied with the Section 307(b) standard of "fair, efficient, and equitable" license distribution. Gerico also contended that the Commission, by authorizing the use of Channel 10, had in effect modified Gerico's station license without the appropriate show cause procedure and hearing required by Section 316(a) of the Act.

The Commission on September 13, 1957, issued a Memorandum Opinion and Order in the Channel 10 proceeding, which denied, inter alia, Gerico's petition and request for a stay (R. 7989-8002). The Commission determined, contrary to the contention

of Public Service, that Gerico had sufficiently alleged standing within the meaning of Section 405 of the Act to petition for rehearing (R. 7995). On the merits, the Commission concluded that its public interest finding to support the Channel 10 grant complied with the standard in Section 309(a), because Section 307(b) considerations were not germane to the adjudicatory proceeding and, in the absence of such an issue, the Commission was under no duty to make a finding of need to support the grant of an available, non-interfering frequency (R. 7996). Further pointing out that the requirement of Section 307(b) was achieved in the 1952 Table of Assignments, the Commission noted that the alleged inequities in the allocation structure were the subject of pending rule making proceedings and that it was within this framework that Gerico must address its arguments and seek relief (R. 7996-7997). And, finally, the Commission concluded that the Channel 10 grant did not constitute a modification of Gerico's license within the meaning of Section 316(a) of the Act (R. 7997-7999).

SUMMARY OF ARGUMENT

This Court's decision in the prior Gerico case establishes the validity of the Commission's action in declining to stay the Channel 10 grant pending a final determination of the questions raised by Gerico in the rule making proceedings. The allocation question, which Gerico seeks to raise, is part of the rule making, rather than of the adjudicatory, proceeding. Having just decided this question in the rule-making proceeding, the Commission need not re-evaluate it in the adjudicatory proceeding. The Channel 10 grant does not modify Gerico's license within the meaning of the Act, as the channel was in existence, adn known to Gerico, at the time Gerico received its license. In any event, while the possibility of economic competition may give the potentially injured party standing to seek or participate in hearings on applications for a channel, it does not constitute a modification of its license within the meaning of the Act or the Commission's Rules.

ARGUMENT

THE COMMISSION PROPERLY DECLINED TO REHEAR, RECONSIDER, OR STAY THE CHANNEL 10 GRANT ON THE PETITION OF GERICO

The issue in this case is basically the same as that decided in Coastal Bend[3/] and resolved adversely to Gerico in the earlier Gerico case. Gerico's underlying contention, presented in a number of forms, is that the Commission should not have made the Channel 10 grant without first determining whether the 1952 allocation is now in the public interest in view of the UHF-VHF problem. To this end, Gerico argues that the Commission was required (1) to stay construction of the Channel 10 facility pending a final determination of the allocation questions raised by Gerico in the Miami rule making proceeding (Br., pp. 37-38), (2) to pass upon such allocation questions in the Channel 10 adjudicatory proceeding (Br., pp. 32-37), and (3) to afford Gerico a Section 316 (a) hearing on its challenge to the Channel 10 allocation prior to making the grant (Br., pp. 15-32).

A. The Commission did not err in declining to stay the Channel 10 grant

The first argument is squarely foreclosed by the earlier Gerico decision. The Court has already declined to stay the Channel 10 proceeding pending final rule making action on the allocation issue and to stay construction under the analogous

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3/ Coastal Bend Television Co. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 234 F. 2d 686.

Channel 7 grant (Gerico Investment Company, supra, 99 U.S. App. D.C. at 381, 240 F. 2d at 412).[4/] As the Court stated in Coastal Bend, the "Commission's decision to adhere to the 1952 allocation for the time being, as reflected in its refusal to institute a 'freeze' on construction permits for VHF stations to prevent competition with existing UHF stations, is well within its statutory authority" and the Court will "not compel the Commission to delay existing adjudicatory proceedings conducted in accordance with the statute and valid regulations thereunder in order to await the outcome of rule-making proceedings" (98 U.S. App. D.C. at 255, 234 F. 2d at 690).[5/] See also, Jacksonville Journal Company v. Federal Communications Commission, U.S. App. D.C. , 246 F. 2d 699.

B. The Commission did not err in declining to pass upon Section 307(b) distribution questions in the Channel 10 proceeding

It is equally clear that the Commission was not required to pass upon the allocation issue in the Channel 10 proceeding. Gerico argues (Br., pp. 33-37) that Section 307(b) compelled the Commission to determine in the adjudicatory proceeding whether the grant complied with the standard of a "fair, efficient and

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4/ While these rule making proceedings have progressed and there is now a decision, final but subject to petitions for rehearing, adding a new channel (VHF Channel 6) to the Miami area, there is nothing in this subsequent history to affect the right of the Commission to proceed with its licensing action on Channel 10 which has remained in Miami since 1952.

5/ The request for a stay of construction is also moot since Channel 10 has been on the air since August 1957 (Br., p. 8).

equitable" distribution of television channels. But that determination was made originally in the 1952 Table of Assignments. The Coastal Bend decision forecloses Gerico's contention that a 1952 allocation is now contrary to the public interest because of the UHF-VHF problem and hence no longer controlling on distributional questions in adjudications conforming to the allocation plan (98 U.S. App. D.C. at 254-255, 234 F. 2d at 689-690). And the Court, in dealing with Gerico's attempt to raise Section 307(b) considerations in the earlier case, found no ground for distinction in the fact that "if Gerico should fold Fort Lauderdale would be without a local TV outlet" (Gerico Investment Company, supra, 99 U.S. App. D.C. at 382, 240 F. 2d 412).

Notwithstanding Gerico's protest to the contrary (Br., p. 35), 6/ the attack in essence is upon the television channel allocation plan. Thus, Gerico asserts (Br., p. 36-37) that even if Section 307(b) does not require the Commission to allocate channels among communities in passing upon specific applications, the Commission nevertheless has authority to consider distribution questions in adjudicatory proceedings

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6/ Gerico's attempt to insert distributional questions in the adjudicatory proceeding runs counter to one of the basic purposes of the allocation scheme: the elimination of such issues from the "processing of applications which would otherwise unduly delay the overall availability of television to the people" (1 R.R. Part 3, 91:604). Moreover, in sustaining the Commission's authority to allocate television channels by rule making (Logansport Broadcasting Corp. v. United States, 93 U.S. App. D.C. 342, 345; 210 F. 2d 24, 27), this Court recognized that "the allocation rule would have a controlling effect on some issues in future adjudications" (Coastal Bend, supra, 98 U.S. App. D.C. at 255, 234 F. 2d at 690).

and could appropriately exercise such authority here. However, while the Commission could "properly proceed either through rule making or adjudication * * *, the choice 'is one that lies primarily in the informed discretion of the administrative agency.' Securities and Exchange Commission v. Chenery Corporation, 332 U.S. 194, 203 (1947))." Logansport Broadcasting Corporation v. United States, 93 U.S. App. D.C. 342, 345, 210 F. 2d 24, 27. The Commission's decision in its Sixth Report and Order to proceed solely by rule making both in distributing channels and in considering changes in the allocation plan, is a proper exercise of that discretion (ibid).

Nor did the Commission abuse its discretion by adhering to this decision under the circumstances here. The identical question which Gerico sought to have resolved in the Channel 10 proceeding was before the Commission in the Miami rule making proceeding (Docket 11756): namely, whether VHF service should be permitted to replace UHF service in the area. The Commission weighed the Section 307(b) factors in that proceeding and decided to retain the existing VHF assignments and assign a new VHF station (Channel 6) to Miami to compensate for the probable loss of UHF service.[7/] If Gerico believed that Channel 10 should be assigned to Fort Lauderdale in lieu of Miami, it should have so contended in this rule making pro-

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7/ Of course, the Miami stations, assuming the Fort Lauderdale station should cease operation, have a duty to serve the needs and interests of Fort Lauderdale. See Petersburg Television Corp., 10 R.R. 567, affirmed, Southside Virginia Telecasting Co. v. Federal Communications Commission, 97 U.S. App. D.C. 130, 228 F.2d 644, cert. den. 350 U.S. 1001.

ceeding, just as it is in fact arguing on reconsideration that VHF Channel 6 should be assigned as a Miami area station which, because of its location, could be used as a replacement for Gerico's Fort Lauderdale station.[8/] In any event, having just considered and determined the distributional question in the rule making proceeding, the Commission could properly refuse to re-evaluate the same question in the adjudicatory proceeding, particularly since the Channel 10 grant is entirely consistent with the rule making decision.[9/]

C. The Channel 10 grant did not modify Gerico's license within the meaning of Section 316 of the Act.

Gerico's third argument, that the Channel 10 grant indirectly modified its license without the prior hearing required by Section 316 of the Act, is no more than a disguised version of the same complaint. Since the claim of modification is based on Gerico's assertion that the VHF grant will subject its UHF operation to ruinous economic competition, the question Gerico would have determined in such a hearing

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8/ As we pointed out in our brief in the first Gerico cases, Nos. 13,154 and 13,155 (pp. 20-22), the UHF-VHF problems are only secondary factors in the problem of maintenance by local stations in cities of the size of Fort Lauderdale located nearby to much larger communities like Miami. Gerico has recognized this fact by not seeking to distinguish in the rule making proceedings between Miami assignments and Fort Lauderdale assignments, but suggesting instead that it should be given the new Channel 6 Miami assignment.

9/ Although not here before the Court, the Commission's actions in the Miami rule making proceeding, including its resolution of the Section 307(b) issue, will be subject to full judicial review once the Commission has acted upon Gerico's petition for reconsideration.

is whether the allocation should be changed because of the UHF-VHF problem. It is true that Gerico presents this question here in terms of whether a VHF channel assigned to Miami since 1952 (before it secured its own UHF grant) should be required to be frozen and to remain unassigned to any other permittee or licensee rather than whether it should actually be deleted as a paper entry in the Table of Assignments set forth in Section 3.606 of the Commission's Rules. But this is a distinction without a difference; whichever way one looks at the question it is either foreclosed by the decision of this Court in the Coastal Bend case supra or, at best, is the identical question before the Commission in the Miami rule making proceeding in which Gerico is being heard. In effect, therefore, Gerico is again arguing that it was entitled to a stay of the Channel 10 grant pending final outcome of the rule making proceeding or to intervene, and have the allocation question determined, in the Channel 10 proceeding.

Even assuming that Gerico can by-pass the adverse resolution of these issues in the first Gerico case by belatedly arguing what did not occur to it then, there has been no modification of Gerico's license within the meaning of Federal Communications Commission v. National Broadcasting Company Inc., (KOA), 319 U.S. 239, and L.B. Wilson, Inc. v. Federal Communications Commission, 83 U.S. App. D.C. 176, 170 F. 2d 793. The KOA case merely holds that the Commission's Rules are incorporated into an existing station's license and the Commission accordingly

must afford an outstanding licensee a prior hearing where another grant will cause objectionable electrical interference within its protected contour as specified in these Rules. The Supreme Court reasoned that when KOA's license was granted the Commission's rules designated certain frequencies as clear channels to be operated at 50 kilowatts and"850 kilocycles was one of the frequencies appearing on the schedule forming part of the rule" (319 U.S. at 245). The Court stated (ibid):

> These rules were incorporated into the terms KOA's license which granted it a frequency of 850 kilocycles and a power of 50 kilowatts. To alter the rules so as to deprive KOA of what had been assigned to it, and to grant an application which would create interference on the channel given it, was in fact and in substance to modify KOA's license.

The situation here is the antithesis of that in KOA. The Commission's Rules in effect when Gerico's license was granted, embodied the 1952 allocation plan assigning both the VHF Channel 10 and UHF Channel 17 to the Miami-Fort Lauderdale area. Since these rules were incorporated into the terms of Gerico's license, the only right assigned to Gerico under its license was to operate its UHF facility in an intermixed area. The prior VHF allocation made "the presence of the available channel an accomplished fact" and the authorization of its use only a matter of time.[10/] Greylock Broadcasting Company v. United States,

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10/ As noted supra, p. 2, competing applications for Channel 10 were pending when Gerico received its license. Because a comparative hearing was required, Gerico was able to go on the air at a time when it did not face this VHF competition. But there was then no question that there would be such competition. The only unresolved question was who would do the competing.

97 U.S. App. D.C. 414, 415, 231 F. 2d 748, 749. In now making the grant pursuant to that allocation, the Commission has not altered the rules in existence when Gerico's license was issued or changed what was assigned to Gerico. In fact, the whole thrust of Gerico's complaint is that the Commission should change the rules. If Channel 10 were a new allocation or "drop in", the question Gerico attempts to raise here as to whether the Channel 10 grant modified its license as a result of the alleged economic impact, would be presented for consideration. But under the circumstances here, there could be no modification in the KOA sense nor any other breach of the hearing requirements of Section 316 of the Act, even assuming, arguendo, a license could be modified within the meaning of this Section as a result of the grant of a competitive facility.

A brief word on appellant's economic modification theory may nevertheless be in order. No license, it should be recognized, is entitled as a matter of statutory right to any protection from electrical interference. Thus, there are many established services where stations are expressly granted under the Commission's Rules subject to receiving any interference which might result from stations of the same or different types.[11/] Broadcast stations of all classes

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11/ See, e.g., Citizens Radio Service (47 CFR Sec. 19.31), Amateur Radio Service (47 CFR Sec. 12.113), Land Transportation Radio Service(47 CFR Sec. 16.8), and Industrial Radio Service (47 CFR Sec. 11.8).

are protected under the Commission's Rules from objectionable interference from some classes of stations to some extent. But this is a matter of Commission policy, and, for example, a Class II AM station on a clear channel frequency is entitled to absolutely no protection from interference from Class I stations on the channel. If a station in the Citizens Radio Service, for example, receives absolutely distructive interference as the result of operation by a newly granted station on that service, its license is not modified within the meaning of the KOA case or Section 316 of the Act since the rules "incorporated into it license" expressly provide that the station is subject to such interference.

Turning to economic injury, it is clear that neither the Commission's Rules nor the Act purport to provide any guarantee of profitable operation or protection from competition loss. We need not, therefore, speculate as to the extent it is proper for the Commission to consider the impact of competitive considerations in various facets of its rule making, or whether the Commission could adopt rules providing protected economic "contours" in the broadcast field, ef. Federal Communications Commission v. Sanders Brothers Radio, 309 U.S. 470.[12/] For the fact remains that

12/ It is accordingly unnecessary to reach Gerico's extended argument (Br., pp. 16-32) with respect to Southeastern Enterprises, 13 R.R. 139. Contrary to Gerico's contention (Br., pp. 13, 22), the Commission's conclusion that it is not entitled to protection from destructive economic competition does not rest on the doctrine that the Commission is powerless

even if we assume that the grant of a new station will destroy an existing one, this destruction is not a modification of the existing station's license. For just as our Citizens Radio Station license is subject to destructive electrical interference from other stations, broadcast stations are, in the absence of any protection from competitive economic injury to their licenses in either the Act or the Commission's Rules, subject to competitive injury even though it might be destructive. A showing of the likelihood of such injury might make them parties in interest entitled as of right to intervene in any hearing on the application for the new station at any time within ten days of the commencement thereof. See Elm City Broadcasting Corp. v. Federal Communications Commission, 98 U.S. App. D.C. 394, 235 F. 2d 811. Or they might for similar reasons have standing under Section 309(c), to protest a grant without hearing under Section 309(a), or under Section 405 to petition for rehearing or reconsideration of a grant made with or without hearing. But it would not constitute a modification of license, either direct or indirect, within the meaning of Section 316.

12/ (Cont'd) to provide such protection, but rather on the fact that neither the Act nor the Commission's Rules presently afford protection of this nature. Moreover, the Commission does not decline to consider the effects of competition between the two different types of channels. Its position is only that such deintermixture problems must be considered within the framework of rule making rather than adjudicatory proceedings.

CONCLUSION

For the foregoing reasons, the decision of the Commission, insofar as it pertains to Gerico, should be affirmed.

Respectfully submitted,

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Federal Communications Commission

February 27, 1958

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,179

GERICO INVESTMENT COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

PUBLIC SERVICE TELEVISION, INC.,

Intervenor.

APPEAL FROM THE FEDERAL COMMUNICATIONS COMMISSION

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UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 14,179

GERICO INVESTMENT COMPANY,

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PUBLIC SERVICE TELEVISION, INC.,

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APPEAL FROM THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR APPELLANT

ARGUMENT

I.
WHETHER GERICO'S LICENSE HAS BEEN MODIFIED BY THE COMMISSION'S ACTION IN GRANTING AN AUTHORIZATION FOR THE USE OF CHANNEL 10, MIAMI, FLORIDA

The question which has been raised by Gerico as to modification of its license is clarified by the briefs of Appellee and Intervenor. While each party argues that, essentially, the question which Gerico urges is an "allocations" question and one which can only be treated in an allocations, or rule making proceeding, this only sharpens the issue in this case and makes clear the need for understanding Gerico's position.

Both the Commission's and Intervenor's arguments concerning "allocations" indicate fundamental confusion over what is actually involved in either allocations or this appeal.

Gerico has raised a licensing question in its appeal. Without treating, at this point, how this question might arise, it is clear, under Section 316 of the Communications Act of 1934, as amended (see Gerico brief, appendix), and under familiar principles of law, that a licensing question cannot be resolved in a quasi-legislative proceeding. If Gerico's license has, indeed, been modified, it is clear that no amount of rule making will change that fact. This is to say, that if Gerico's contention is correct, then it cannot be resolved by rule-making, for a new allocation will not change the condition. Only a change in authorizations or, to put it more clearly, in licenses, can solve the essential licensing question involved here. Thus, it is not particularly helpful on the part of the Commission to again refer Gerico to a rule making proceeding in order to resolve a licensing question.

To state the problem differently, the issue at stake here is whether Gerico's license has been modified; not whether the Commission should undertake rule making to change channel assignments. The fact that the Commission has undertaken a rule making proceeding to add another channel to Miami does not change the situation, for whether the Commission adds a channel or not, the effect on Gerico's license is the same. It may therefore be said, as a kind of first principle, that the question of the modification of Gerico's license exists independent of how that modification might take place.

On the other hand, the question of how the modification has taken place is obviously germane to this proceeding. Both the Commission and Public Service insist that this is essentially an allocations question; that is, without admitting that Gerico's license may be involved, they each state that it is in an allocations proceeding (namely, the Miami Channel 6 rule making proceeding, Docket 11,756), that the Commission

has decided to permit "VHF service . . . to replace UHF service in the area." (FCC brief, p. 11) Now, it is obvious that mere allocations, without more, have little to do with licensing. It can easily be understood that the mere assignment of a channel to an area does not involve a licensing question, at all. Indeed, it represents nothing more than a hope on the part of the Commission, or a theoretical scheme of potential service.

Additional light is shed upon the subject when we review the action which has been taken by the Commission in the Evansville deintermixture proceeding. (22 F.C.C. 382; see also Evansville Television, Inc. v. Federal Communications Commission, Case No. 14,046) There, in order to encourage UHF broadcasting, and protect against the injury anticipated to flow from the presence of VHF service, the Commission decided to delete the only VHF channel in the city, but, could not accomplish this result in rule making. Since a station was licensed to use the VHF channel, and was providing service to Evansville, the Commission concluded, rightly, that it was required to modify the license of that station in order to accomplish the desired result. In other words, the mere decision to change a channel allocation had no bearing on the injury to the UHF stations; the resolution of the question required treatment of the licensing question.

On the other hand, in the Peoria case, recently decided by this Court, since no license was involved, the case was entirely resolved through allocations. WIRL Television v. Federal Communications Commission, 1958, __ U.S. App. D.C. __, __ F. 2d __ (Case No. 13,768, 13,769, 13,912, decided March 27, 1958). That is, in the Peoria case, the Commission was dealing with potential rather than actual destruction of service, and because there were no intervening VHF license rights involved, it was able to deal with the question through rule making. The result, however, was the same, since the Commission then refused to license a station to operate on Channel 8.

In either case, however, the Commission was dealing with causes rather than effects. That is, in terms of the effect of destructive service upon another service, the Commission took steps to remove the cause. Here, the Commission is asked to deal with the question of the result, however it might be caused.

Now it is obvious that whatever the legal question may be, the effect upon Gerico's license has been the direct result of the Commission's Channel 10 licensing proceeding. It may be, as the Commission seems to suggest, in its brief, that the action which finally injured Gerico was the decision by the Commission to permit VHF to destroy UHF in the Miami area, which decision was not finally reached until after Gerico filed its appeal in this case. But that decision finally confirmed the Channel 10 grant, if we follow this reasoning to its conclusion, and this, in terms of the result to Gerico, constituted the act which ultimately modified Gerico's license.

Gerico, as the Commission and Public Service have both pointed out, has raised this question in the Miami Channel 6 rule making proceeding, through its petition for reconsideration and its motion for the issuance of a modified license. Since the question involves analysis of the result to Gerico of actions by the Commission, that question is obviously pertinent in each proceeding; however, it does not matter, essentially, where this question is resolved, as long as the Commission deals openly and honestly with the results of its action, somewhere.

Subsequent to the filing of the Commission's brief, in which it was suggested that Gerico's problem was being resolved in the Channel 6 rule making proceeding, the Commission, on February 21, 1958, denied Gerico's petition for reconsideration and its motion for the issuance of a modified license in the Miami Channel 6 rule making proceeding, holding that it had not, in any of its actions, modified Gerico's license. Gerico has filed appeals from that order (Gerico Investment Company v. Federal Communications Commission, Case

No. 14,386; Gerico Investment Company v. United States of America, Case No. 14,387) and, in view of the inter-relation of the questions involved, it would appear that these cases might appropriately be consolidated by the Court for the purpose of decision. It can be seen that, as a consequence of the timing of its decisions by the Commission, and the nature of the question, itself, it was a matter of legal necessity that Gerico file the appeal in this case, particularly in view of the avenue of specific appellate relief available to Gerico in the event that the question is resolved in Gerico's favor in this proceeding.

Finally, neither the Commission nor Public Service really attempt to deal with the question of whether Gerico's license has been modified through any of these proceedings. Instead, the briefs deal, mainly, with the question of where this question should be raised; or, how it should not be raised here.[1]

II.

WHETHER THE GERICO APPEAL IS APPROPRIATELY TAKEN IN CONNECTION WITH THE CHANNEL 10 FINAL DECISION

Actually, the second position taken by the Commission and by Public Service, is answered by the first. In other words, in claiming that Gerico's question is being dealt with in the Miami Channel 6 rule making proceeding; or in claiming that the Commission was not required to consider a Section 307(b) question in the Channel 10 proceeding, in the absence of a specific issue (this language is formalistic, and must be understood by the Court to mean that the Commission is addressing itself to its general statutory obligation to consider a Section 307(b) question if, in fact, it exists in any case); or in claiming that Gerico's

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1 As Gerico pointed out in its Brief, one of the consequences which could be anticipated to flow from the situation in which Gerico finds itself as a result of the Commission's actions, is the legal effect upon Gerico's status as a financially qualified applicant or operator of a television station. Subsequent to the filing of Gerico's brief, the Commission raised this specific question in connection with Gerico's application for the use of Channel 6 and in connection with Gerico's application for renewal of license. In the former, the Commission has formally proposed to deny Gerico's application in view of Gerico's financial position which directly flows from the Channel 10 authorization; in the latter, the Commission has formally withheld action on the renewal application for the same reason.

appeal is encompassed within the Court's earlier decision in Gerico Investment Company v. Federal Communications Commission, supra, neither Public Service nor the Commission is attempting to deal with the essential question presented by this appeal. Rather, these contentions are addressed to the cause rather than to the result and seem to assume that if cause can be related to "allocations" rather than to "licensing" it automatically answers the licensing question raised by Gerico.

All of this bespeaks the need to understand the essential nature of the question which is involved in Gerico's appeal. For instance, the Commission appears to argue that Gerico is bound by the bits of printing that appear in the Table of Assignments, without more. But the Commission is not dealing with the question of what those bits of printing represent. The allocation of channels represented a scheme for television service distribution. Where individual authorizations are formalistically in harmony with the scheme, as in the Channel 10 proceeding, but in actuality violate the concept which the scheme represents, as in the Channel 10 proceeding, can it then be said that the authorization in question is, really, consistent with the Rule? Or should we not say that the authorization in question is fundamentally antagonistic to the Rule, itself?

Even if we could rationally reach the conclusion that the formalistic aspect of the Commission's Rule should be controlling, we must also conclude that, as a result of the proceedings in Docket 11532, the basis for the form has been dissolved by the Commission and the Table no longer has specific applicability in cases such as Gerico's.

The foregoing would appear to represent the essence of the Court's decision in Gerico Investment Company v. Federal Communications Commission, supra, where it was held that the Rule in question was that adopted in the Sixth Report and Order specifying the "intermixture" of markets as the underlying concept of the bits of printing in the Table of Assignments.

Finally, even if we could reason to the Commission's position, and accept the thesis, we would still be presented with a fundamental question, for the formalistic bit of printing also specifies "Channel 17, Fort Lauderdale, Florida" and not merely "Channel 10, Miami, Florida." If the Commission decides, indirectly, to eliminate "Channel 17, Fort Lauderdale, Florida" by authorizing "Channel 10, Miami, Florida" has it not, in fact, altered its own Table of Assignments contrary to the form of the Rule? In other words, if the Table represents a Rule specifying potential service, can the Commission reasonably contend that an authorization inconsistent with the potential service specified in the Rule is nevertheless consistent even with the bit of printing upon which it relies?

CONCLUSION

In consideration of Gerico's Brief, and of the foregoing, it is respectfully submitted that the Commission's decision in the Miami, Channel 10 proceeding, should be reversed and remanded in accordance with the prayer submitted by Gerico in its Brief.

Respectfully submitted,

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BRIEF FOR INTERVENOR

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,179 288

GERICO INVESTMENT COMPANY, *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

PUBLIC SERVICE TELEVISION, INC., *Intervenor,*

Appeal From the Federal Communications Commission

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United States Court of Appeals
For the
District of Columbia Circuit
FILED FEB 3 1958
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QUESTIONS PRESENTED

Appellant has accurately stated three stipulated questions as presented by its appeal. However, intervenor Public Service Television, Inc., hereafter referred to as Public Service, believes that none of these questions is properly before this Court because this Court lacks jurisdiction to decide them. The jurisdictional question may be summarized as follows:

May this Court review the Commission's judgment as to what should be done about the deintermixture problem in Miami upon an appeal from a comparative hearing decision?

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,179

GERICO INVESTMENT COMPANY, *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,

PUBLIC SERVICE TELEVISION, INC., *Intervenor*,

Appeal From the Federal Communications Commission

BRIEF FOR INTERVENOR

COUNTERSTATEMENT OF THE CASE

Appellant is in error in stating that this appeal involves "allocations questions". The order appealed from was released on February 8, 1957 and awarded VHF Channel 10 to Public Service upon the basis of a comparative hearing involving three other applicants. Gerico was not a party to that hearing but had unsuccessfully sought to inject an allocations issue into that hearing by a petition for intervention and stay of the proceedings, which was denied by the Commission on October 20, 1955. Gerico's petition for reconsideration of that decision was denied on January 20, 1956, and on Jan-

uary 17, 1957, this Court sustained the Commission's action. *Gerico Investment Co.* v. *Federal Communications Commission*, 99 U.S. App. D.C. 379, 240 F. 2d 410. This Court there held that the Commission's decision to authorize construction permits for VHF Channels 7 and 10 in Miami, before reaching a final decision in pending deintermixture proceedings, was a "matter of agency discretion" which this Court would not disturb. *Ibid.*, at 413.

On March 11, 1957, Gerico again unsuccessfully sought to inject an allocation issue into this proceeding by petitioning for reconsideration of the February 8, 1957, decision awarding Channel 10 to Public Service. Gerico also requested a stay of Public Service's construction permit. (R. 7891-7911.) This petition was denied by the Commission on September 13, 1957, because the considerations which would be pertinent in an allocation proceeding under Section 307 (b) "are not germane in the present case. In the absence of a Section 307 (b) issue, the Commission is under no duty to make a finding of need to support the grant of an application when a non-interfering frequency is available. We, therefore, conclude that our finding of public interest, convenience and necessity to support the instant grant complies with the standard provided in Section 309 (a) of the Communications Act of 1934, as amended." (R. 7996.)

The facts relied upon in Gerico's statement of the case are not in this record[1] but have been placed before the Commission by Gerico in FCC Docket 11756, the Miami deintermixture proceeding begun at Gerico's insistence. Although Gerico's brief to this Court refers to the pendency of its petition for reconsideration in this FCC allocation proceeding, it has neglected to state the facts which show that the merits of the question it

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[1] A careful search of Appellant's brief fails to reveal a single citation to the record of this appeal.

seeks to litigate here are actually being litigated before the FCC. In that proceeding the Commission found by Report and Order on April 29, 1957, that the Miami area should be deintermixed by replacing the existing UHF service with a new VHF allocation, Channel 6. (Appendix A.) The stated basis for this decision is a finding which accepts as true Gerico's contention that the advent of television service by Public Service on Channel 10 that station will "in all probability, destroy the ability" of Gerico's WITV "to continue to provide service". Channel 6 was therefore added as a fourth VHF service "to offset this loss" of existing UHF service. (*Ibid.*, Par. 13.)

Gerico's petition for reconsideration does not quarrel with this solution of the Miami deintermixture problem except as it threatens a possible award of Channel 6 to someone other than Gerico. (Appendix B, par. 1.) Gerico has attached to its petition for reconsideration in the allocations matter, a motion for the issuance to it of a modified license for channel 6 which would permit Gerico to place its transmitter at the Miami "antenna farm", near Ft. Lauderdale, instead of at the point south of Miami specified in the Commission's order. (Appendix C.) Gerico is there asking that either the modified license be granted or a further hearing held to consider appropriate relief for Gerico. The Commisison has not yet taken final action on Gerico's requests.

ARGUMENT

As appears from the foregoing counterstatement of the case the Commission has now decided in a pending allocation hearing, FCC Docket 11756, the basic question that Gerico seeks to litigate here, i.e., whether VHF service should be permitted to replace all UHF service in the Miami area. Gerico is presently seeking to capitalize upon the Commission's decision that Miami

should have an all VHF service by acquiring Channel 6 as a replacement for its present Channel 17. Whether it is successful or not will depend upon Commission action not yet taken with respect to Gerico's pending petition for reconsideration and application for modified license in the allocations proceeding. (Appendices B and C.)

The Commission and this Court have already declined to stay the Channel 10 service pending any final FCC allocation action. *Gerico Investment Co.* v. *Federal Communications Commission, supra.* The request for a stay of construction is also moot since Channel 10 is now on the air. The requested "show cause proceeding to determine whether Gerico's license should be modified" (Appellant's brief, page 38), if granted, would present the same allocation issue as is now before the Commission in FCC Docket 11756. In its pending motion in that case Gerico makes precisely the same claim of modification that is made here. Paragraph 14 of that pending motion opens with the statement that "By deciding to adopt the VHF route, the Commission also modified WITV's license as the sole existing UHF station in the market * * *". (Appendix C.) Gerico's appeal in this case is a mere nuisance device, wholly unnecessary to protect any right to litigate in this Court any injury to Gerico's UHF license, by "modification" or otherwise, which may result from Commission action.

There will be no occasion for this Court to review the merits of Gerico's complaint about the Commission's allocation action until and unless the Commission rules adversely upon Gerico's petition for reconsideration and modification of license request in FCC Docket 11756 and an appeal is taken from that action. If there is any validity to any of the arguments made here as to the propriety of the Commission's procedure in deciding to re-

place UHF service with VHF service in the Miami area appropriate action may be taken by this Court in the course of that appeal.

CONCLUSION

The issues posed by Gerico's request for stay of construction pending final allocation action were adjudicated adversely to it in *Gerico Investment Co.* v. *Federal Communications Commission, supra.* The issues presented by Gerico's complaint as to the nature of the Commission's allocation action must necessarily await a final Commission decision in FCC Docket 11756 before they are ripe for consideration here. We therefore respectfully submit that Gerico's instant appeal presents no question which this Court is now in a position to decide and should be dismissed for want of jurisdiction.

Respectfully submitted,

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Dated: February 3, 1958

APPENDIX

APPENDIX A

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

Washington 25, D. C.

FCC 57-412
43305

Docket No. 11756

In the Matter of

AMENDMENT OF SECTION 3.606,
TABLE OF ASSIGNMENTS,
TELEVISION BROADCAST STATIONS
(Miami, Florida)

Report and Order

By the Commission: Commissioners Hyde and Craven dissenting; Commissioner Doerfer not participating.

1. The Commission has before it for consideration the proposal set out in its Notice of Proposed Ruling Making (FCC 65-600) released in this proceeding on June 26, 1956, for the amendment of the Table of Assignments for Television Broadcast Stations (Section 3.606 of the Commission's Rules) so as to assign Channel 6 to Miami, Florida.

2. The Commission issued its Report and Order (FCC 56-587) last June in the general television allocation proceeding in Docket No. 11532, outlining a long-range program designed to improve the television allocations structure. Since some years may be required to implement this long-range program, we also considered in that proceeding what interim action might be taken to improve the opportunities for effective competition among a greater number of stations in individual communities. In furtherance of this interim program the instant rule making proceeding and a number of others have been initiated proposing changes in channel assignments for various communities throughout the country.

3. The proposal upon which the Commission invited comments in this proceeding would assign Channel 6 as a "drop-in" to Miami to give it a fourth commercial VHF channel, as follows:[1]

	Channel No.	
City	Present	Proposed
Miami, Florida	*2, 4, 7—, 10+, 23—, 33	*2, 4, 6, 7—, 10+, 23—, 33

4. The Commission also has under consideration the counterproposal submitted by Gerico Investment Company, permittee of Station WITV on Channel 17 at Fort Lauderdale, Florida, which would assign Channel 6 to Fort Lauderdale rather than Miami by utilization of the so-called "antenna farm" now used by Miami and Fort Lauderdale stations at less than the minimum transmitter spacing requirements and employment of a directional antenna system to protect co-channel and adjacent channel stations from objectionable interference.

5. Comments and reply comments supporting the Commission's proposal were filed by Storer Broadcasting Company, permittee of Station WGBS-TV on Channel 23 at Miami and by the American Broadcasting Company. Orlando Broadcasting Company, Inc., licensee of Station WDBO-TV on Channel 6 at Orlando, Florida, and WTVJ, Inc., licensee of Station WTVJ on Channel 4 at Miami, filed comments in opposition. Gerico Investment Company also opposed the Commission's proposal. Gerico's counterproposal to assign Channel 6 to Fort Lauderdale was opposed in reply comments filed by Orlando Broadcasting Company and by John H. Phipps, permittee of Station WPTV on Channel 5 at West Palm Beach, Florida. Mr. Phipps stated that he took no position with respect to the Commission's proposal to allocate Chan-

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[1] The offset carrier designations were listed in a Notice of Further Proposed Rule Making (FCC 56-821) released September 5, 1956, in the several reallocation proceedings.

nel 6 to Miami provided mileage separation requirements are met.

6. In outlining our interim plans for improving the television situation in individual communities and areas in our Report released last June, we noted that the widely varying circumstances in individual markets and the numerous factors bearing on the choice of techniques in any individual community or area made it impossible to formulate rigid criteria which could automatically be applied in individual cases to indicate the course which would best serve the public interest. We did conclude, however, that certain considerations would have a bearing on our decisions with respect to proposals to change channel allocations in specific communities or areas. Among these considerations, the following are pertinent to the proposals before us in this proceeding and have been taken into consideration in reaching our decision: In cases where it is unnecessary to move the channel from another city (a) the desirability of assigning a first VHF channel or of adding an additional VFH channel would depend principally upon whether it is possible to locate the new transmitter so as to meet minimum transmitter spacings, and (b) whether the addition of a new VHF assignment would be consistent with the objective of improving the opportunities for effective competition among a greater number of stations.

* * * * * * * * * *

8. We shall review first the present television situation in the Miami and Fort Lauderdale area. Miami, with a 1950 city population of 249,276 and a 1950 metropolitan area population of 495,084, ranks as the 42nd largest city and as the 34th metropolitan area in the country. Five commercial channels,VHF Channels 4, 7 and 10 and UHF Channels 23 and 33 have been allocated, and VHF Channel 2 is reserved for education. Stations on VHF Channel 2 (WTHS-TV); VHF Channel 4 (WTVH); VHF

Channel 7 (WCKT); and UHF Channel 23 (WGBS-TV)[1] are on the air. Construction of a third VHF commercial station on Channel 10 (WPST) was authorized on February 7, 1957 but is subject to further proceedings as a result of court action. A construction permit for a UHF station on Channel 33 has been outstanding since 1953, but the station has never been built. Fort Lauderdale, with a 1950 population of 36,328 is less than one-sixth the size of Miami and located about 25 miles north of that city. Two commercial channels, both UHF—Channels 17 and 39—have been allocated. A station is operating on Channel 17 (WITV). WFTL operated on UHF Channel 39 from April, 1953 to December 1954, and the construction permit for this station was deleted March 25, 1955. Since the "antenna farm" area, located about 14 miles north of Miami and about 10 miles south of Fort Lauderdale, is utilized for the transmitters of all existing Miami and Fort Lauderdale stations, the four Miami stations provide Grade B or better service to Fort Lauderdale, and the Fort Lauderdale UHF station provides Grade B or better service to Miami. No stations in other cities provide Grade B service to Miami or to Fort Lauderdale, but the signals of the two VHF stations at West Palm Beach (Stations WPTV on Channel 5 and WEAT-TV on Channel 12) provide service to portions of the Grade B service areas of the Miami and Fort Lauderdale stations.

9. At the outset we must determine whether the conflicting proposals for the assignment of Channel 6 at Miami or to Fort Lauderdale would meet the technical allocation requirements, since if such a determination cannot be made with respect to each proposal, there is no need to pro-

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[1] By letter dated April 1, 1957, Storer Broadcasting Company advised the Commission that it intended to suspend operation of WGBS-TV on April 14, 1957 for a period ending May 20, 1957, the expiration date of its current construction permit and that it had entered into a contract for the sale of most of the physical assets of WGBS-TV to the permittee of the Channel 10 station at Miami.

ceed to the consideration of their comparative merit. Consideration was given to the possibilities offered by proposals calling for departure from the engineering standards in our Report and Order of last June in the general television proceeding and in subsequent decisions (See Memorandum Opinion and Order, FCC 56-1269, Docket No. 11532, released December 27, 1956), and we have repeatedly rejected such proposals, whether on a general or case-by-case basis, as a desirable or feasible means of effectuating our immediate objective of improving the opportunities for more effective competition among a greater number of stations in individual communities and areas pending a resolution of our long-range program to improve the television allocation structure.

10. The assignment of Channel 6 to either Miami or Fort Lauderdale can be made without disturbing any other assignment or authorization. However, Gerico Investment Company concedes that its proposal to assign Channel 6 to Fort Lauderdale would not meet the minimum mileage spacing requirements of the Rules. Its proposal contemplates the utilization of the "antenna farm" used by Miami and Fort Lauderdale stations, and such a location would be approximately 190-193 miles instead of the required 220 miles from the transmitter of Station WDBO-TV on Channel 6 at Orlando and barely 60 miles from Station WPTV on Channel 5 at West Palm Beach. While Gerico urges that it is technically feasible to protect these co-channel and adjacent channel stations from interference to the extent required by the Rules by means of a directional antenna system, it offers no arguments in support thereof which were not fully considered and rejected in the general allocation proceeding. Since Channel 6 cannot be assigned to Fort Lauderdale in accordance with minimum spacing requirements, it must be rejected.

11. The assignment of Channel 6 to Miami can be accomplished in conformity with the Commission's minimum mileage separation requirements by locating the transmitter for a Miami Channel 6 station south of Miami so as to maintain the required 220 mile separation from the co-channel station (WBDO) at Orlando and the required 60-mile separation from the adjacent channel station (WPTV) on Channel 5 at West Palm Beach. However, the opponents argue that because of aeronautical considerations in the area around Homestead, Florida, where a site must be used to meet separation requirements, antenna towers of sufficient height cannot be utilized which would enable a station to cover Miami with the required city grade service. In our view, such a conclusion cannot be reached from the record. The record demonstrates that a transmitter can be located in an area south of Miami from where the requisite minimum city-grade signal could be placed over the city. The question of whether aeronautical hazards and limitations would preclude utilization of a particular site in this general area south of Miami in conformity with separation and coverage requirements is one which we believe can more readily be resolved, in connection with a particular station application or applications, where a specific proposal or proposals for a tower location and height are before us. We do not believe the record supports the basis for concluding that it would not be possible to obtain a satisfactory site.

12. Orlando Broadcasting also opposed the allocation of Channel 6 to Miami on the grounds that it would cause destructive interference to substantial portions of its service area and that, since the mileage separation requirements precluded the use of the Miami "antenna farm" as the site for a Channel 6 station, the allocation would be inconsistent with the Commission's policy to encourage the delevopment and utilization of "antenna farms". Neither of these arguments has merit.

Channel 6 in Miami would meet all allocation requirements, and the Rules provide that existing stations are afforded protection from interference by the minimum separation requirements and the maximum heights and powers. Television stations are not protected from any interference which may be caused by the grant of a new station in accordance with the allocation standards, and no reasons have been submitted in the instant case which we believe would warrant departing from this policy. With respect to Orlando's argument concerning our "antenna farm" policy, we wish to state that, while we recognize the decided advantages of so-called "antenna farms" in certain circumstances, we have never based our determination of whether a television channel should be assigned to a particular community on the question of whether an available "antenna farm" could or could not be utilized in conformity with the Rules. We see no inconsistency in not doing so here. We do not believe that the fact that an "antenna farm" cannot be used should preclude the assignment of a much-needed additional outlet. We likewise must reject the argument advanced by Orlando and WTVJ with respect to the possibility that a Miami Channel 6 station and Station CMG-TV on Channel 6 at Havana, Cuba, may cause each other an unpredictable amount of interference in the future, especially if the Cuban station should increase its power from time to time. We can draw no conclusion from the record as to the extent of potential interference over land areas which might result, and the allocation of Channel 6 to Miami would conform to our Rules.[2] For these reasons, we are of the view that the Commission's technical allocation requirements would permit the allocation of Channel 6 to Miami.

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[2] The domestic assignment standards of the Commission would not appear applicable in this instance to the specific relationship of Miami versus Havana television assignments on Channel 6. There is no bilateral agreement between this country and Cuba which would preclude the assignment of Channel 6 to Miami.

13. There remains for consideration the question of whether, in the light of all the factors, the assignment of Channel 6 to Miami would further our program of improving the opportunity for effective competition among a greater number of stations. Both Storer Broadcasting Company and Gerico Investment Company indicate that since the commencement of operation of the second VHF commercial service in Miami last July (Station WCKT on Channel 7), the competitive situation of their UHF operations at Miami and Fort Lauderdale has worsened. Storer reports that it lost its network affiliation when Station WCKT commenced operation and since that time its UHF station has incurred continued substantial monthly operating losses. Gerico states that while it has thus far retained its network affiliation, many of its advertising contracts were terminated with the inception of service by Station WCKT on Channel 7, and it has managed to survive only on a marginal basis. Both parties stress that the inception of a third commercial VHF service in Miami on Channel 10 will seriously endanger the chances of survival of their UHF operations. In fact, Gerico states that if a third VHF station is established in Miami, it is almost a certainty that it will be forced to cease operation of its Fort Lauderdale UHF station. Our experience in other markets convinces us that the advent of a third VHF station in a market such as Miami would, in all probability, destroy the ability of the two existing UHF stations in the area to continue to provide service and eliminate the potentiality for other UHF stations on the UHF channels allocated to the area, as well as the possibility of more effective competition among a greater number of stations.[3] Since the construction of a station on Channel 10 has now been authorized, a third commercial VHF station may be expected to commence operation in the near future. If, as a

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[3] Storer Broadcasting Company has now suspended operation of its UHF station at Miami.

result thereof, UHF fails in this area, it would mean that the important, sizable and fast-growing Miami and Fort Lauderdale areas would be dependent upon only three commercial television services instead of the four commercial services now available in the area. The allocation of a fourth VHF commercial assignment to Miami would make it possible partially to offset this loss in available services and would further our objective of improving the opportunities for effective competition among a greater number of stations. While the opponents urge that a Channel 6 station located south of Miami would be at a competitive disadvantage with the VHF stations located north of Miami at the "antenna farm", we believe any such disadvantage would be of short duration and would not inhibit the opportunities for a Channel 6 station to compete on a comparable basis in the area. It is our judgment therefore, that the allocation of Channel 6 to Miami would serve the public interest by creating improved opportunities for comparable and effective competition and insuring the likelihood of more and better television service and more local television outlets in the Miami area.

13. Authority for the adoption of the amendment herein is contained in Sections 1, 4(i), and (j), 301, 303(a), (b), (c), (d), (e), (f), (g), (h), and (r) and 307(b) of the Communications Act of 1934, as amended, and Section 4 of the Administrative Procedure Act.

14. In view of the foregoing, IT IS ORDERED, That effective June 3, 1957, the Table of Assignments, contained in Section 3.606 of the Commission's Rules and Regulations, Is AMENDED, insofar as the community named is concerned as follows:

Amend to read:

City	Channel No.
Miami, Florida	*2, 4, 6, 7—, 10+, 23—, 33

FEDERAL COMMUNICATIONS COMMISSION

MARY JANE MORRIS
Secretary

(SEAL)

Adopted: April 24, 1957
Released: April 29, 1957

NOTE: Rules change herein will appear in Amendment 3-66.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C.

Docket No. 11756

In the Matter of

AMENDMENT OF SECTION 3.606,
TABLE OF ASSIGNMENTS,
TELEVISION BROADCAST STATIONS,
Miami, Florida

Petition for Reconsideration

Comes now Gerico Investment Company, licensee of television station WITV, Channel 17, Fort Lauderdale, Florida, by its attorneys, and respectfully requests the Commission to reconsider its action of April 29, 1957, in the above entitled proceeding, assigning Channel 6 to Miami, Florida, for the reasons set forth below.

1. By its action of April 29, 1957, the Commission effectively deleted UHF service in the Miami area and modified the license of WITV, the only existing UHF station in the

area, without either directing a proceeding pursuant to the provisions of Section 316 of the Act, or directing WITV to operate on Channel 6 in conformity with the administrative action accomplished herein. WITV has, this day, filed with the Commission a "Motion for the Issuance of a Modified License." A copy of the aforesaid Motion is attached hereto and made a part hereof by reference. For the reasons set forth therein, the Commission erred in not directing WITV to operate on Channel 6, Miami, or, in the alternative, providing to WITV the hearing required under Section 316 of the Act.

2. The Commission erred in not making findings based upon the only evidence of record with respect to the airspace considerations involved in locating an antenna for Channel 6 at the required minimum mileage separation from the co-channel station in Orlando. In this connection, the Comments of WITV are herewith incorporated and made a part hereof by reference. WITV submitted an exhaustive survey showing that, in order to comply with the Commission's standards any person utilizing Channel 6 at the required separation point, must construct an antenna in excess of 800 feet in height. WITV also demonstrated that a structure of such height *per se* violates the standards set forth in Air Force Regulation AFR 86-3 and, further, that any such structure must, as a matter of course, violate the requirements of Part 17 of the Commission's Rules and Regulations relating to hazards to air navigation. However, the Commission stated that "We do not believe the record supports the basis for concluding that it would not be possible to obtain a satisfactory site." There was no evidence of record contrary to the data submitted by WITV and correspondingly absolutely no support for the above-mentioned finding by the Commission.

3. The Commission erred in rejecting, out of hand, the proposal by WITV that Channel 6 be assigned to Miami

with the proviso that the facility be authorized for use at the antenna farm area at less than the required minimum mileage separation distance from co-channel station WDBO-TV, Orlando, and WPTV-TV, Channel 5, West Palm Beach. In this connection the Comments and Reply Comments of Gerico are herewith incorporated and made a part hereof by reference. In its only answer to Gerico's contentions, the Commission stated that "while Gerico urges that it is technically feasible to protect these co-channel and adjacent channel stations from interference to the extent required by the Rules by means of a directional antenna system, it offers no arguments in support thereof which were not fully considered and rejected in the general allocation proceeding." Not only was Gerico prevented from submitting information as to the possible uses of a channel at less than minimum mileage requirements in Miami, as a result of the Commission's specific direction in Docket 11532 that it would not consider proposals directed to individual markets, but the Commission now uses the absence of such information as the basis for its findings in this proceeding. Furthermore, inasmuch as this proceeding deals with the specifics of an individual market and is a proceeding whose purpose is to provide for the fuller utilization of the television spectrum, be it VHF or UHF, the failure of the Commission to consider Gerico's proposal on the merits was that much more objectionable. In any event, Gerico is entitled to a decision from the Commission dealing with the merits of its proposal and warrants something more than the treatment accorded to it in the decision, especially in view of the fact that the Commission has specifically relaxed its separation requirements in connection with a UHF authorization in a recent proceeding. If the decision to retain mileage requirements is a policy matter, it should apply to all licensees of the Commission equally. It is not Gerico's "arguments" which are at issue, nor a general policy against relaxation of the separation requirements.

The Commission is here dealing with the use of a specific channel in a specific market where all legal and policy questions lead to the single conclusion that the proposal submitted by Gerico should be adopted. It is in the context of *this* proceeding and no other that the Commission must decide this question.

4. The Commission erred in failing to make findings based upon Section 307(b) of the Communications Act of 1934, as amended. Gerico specifically urged the 307(b) questions involved in the allocation proposed in this proceeding and its Comments and Reply Comments in respect thereto are incorporated and made a part hereof by reference. Inasmuch as this is a quasi-legislative proceeding, the authority for which rests upon Section 307(b) of the Act, the failure of the Commission to apply the mandatory test contained in that Section is clear and demonstrable error. Among other things, a proper application of Section 307(b) should compel the Commission to reach the conclusion that Channel 6 must be assigned to the Miami area in such a manner as to replace the service lost by making the assignment and that if other considerations do not permit this objective to be reached, then Section 307(b) requires that the Commission adopt the alternative to the VHF deintermixture proposal and delete one or more of the existing VHF channels in the market, thus permitting retention and expansion of television service in a manner consistent with the policy objectives not merely of Section 307(b) of the Act, but of Docket 11532. In addition, the failure of the Commission to apply, in paragraph 8 of its Order, the *current official* United States Bureau of the Census statistics relating to population of Dade and Broward counties and the cities of Miami and Fort Lauderdale, is further error, for those figures destroy the findings of this paragraph and heighten the 307(b) questions involved in a proper treatment of this case. All of the current *official* information, including data from the 1954 United States Census of Business, was

contained in paragraphs 58 through 61 of the Comments of Gerico Investment Company filed herein on December 3, 1956.

WHEREFORE, THE PREMISES CONSIDERED, Gerico Investment Company respectfully requests the Commission to reconsider its Order of April 29, 1957, in the above-mentioned proceeding, and (1) forthwith issue to Gerico Investment Company a modified license to specify operation on Channel 6, Miami, Florida; (2) revise said Order to take into consideration the airspace and 307(b) questions involved herein, and (3) revise said order to assign the Channel so as to permit the use of the Channel at the antenna farm area with appropriate restrictions to protect the rights of co-channel and adjacent channel stations which might otherwise suffer some measure of interference.

Respectfully submitted,

GERICO INVESTMENT COMPANY
By /s/ FRED J. EDEN, JR.
WELCH, MOTT & MORGAN
Its Attorneys

Communications Building
710 Fourteenth Street, N. W.
Washington 5, D. C.

May 29, 1957

APPENDIX C

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.

File No. BLCT-513

In the Matter of:

GERICO INVESTMENT COMPANY (WITV)

Fort Lauderdale, Florida

Modification of License

Motion for the Issuance of a Modified License

Comes now Gerico Investment Company, by its attorneys, and moves the Commission to issue to it a modified license to specify operation on Channel 6, Miami, subject to the filing by Gerico of appropriate technical information. In support thereof, it is respectfully stated as follows:

1. Gerico Investment Company is the licensee of Television Station WITV which, since November, 1953, has operated on Channel 17, Fort Lauderdale, Florida.

2. WITV is the only UHF station in existence and operating in the Miami area. On April 13, 1957, Storer Broadcasting Company, permittee of television station WGBS-TV Channel 23 voluntarily left the air and sold its entire plant and equipment to WPST-TV, the newly authorized permittee of Channel 10, Miami. No other UHF stations have ever been constructed and operated in the Miami area.

3. There are presently authorized and in operation two commercial VHF and one commercial UHF television stations in the Miami area. A construction permit has been granted for Channel 10, but that station is not yet on the air. All of the existing and proposed television stations have their antennas situated on an air-space

approved antenna farm approximately 14 miles north of Miami and 10 miles south of Fort Lauderdale. WITV, operating with nearly 500,000 watts visual power provides the same quality signal to Miami and Fort Lauderdale as do the existing and proposed VHF stations.

4. Since 1954, the Commission has had before it, generally, the question of the validity of its allocations policies promulgated in the Sixth Report and Order which led, in the first instance, to the deliberate intermixture of VHF and UHF television assignments. Insofar as the Miami area is concerned, Gerico has urged since it filed its "Petition for Deintermixture, Order to Show Cause, and Stay" on April 14, 1955, that the intermixture policy was invalid and has proposed that the Commission provide for virtually unlimited competitive television in this major market by means of total or partial deintermixture on a UHF basis.[1] Gerico's proposals were made at a time when only a pre-freeze VHF television station was in existence in the Miami area and no final decisions had been made in either of the two pending comparative proceedings among applicants requesting authorizations on Channels 7 and 10. In connection with its Petitions requesting rule-making proceedings looking toward the deletion of VHF channels in Miami, Gerico also requested that the Commission defer action in the Channel 7 and Channel 10 proceedings.

5. The Commission declined to withhold action on its comparative proceedings in Miami, as it similarly declined with respect to Madison, Evansville, Corpus Christi, Peoria, and other UHF trouble spots, which decision, as to Miami, was upheld by the Court of Appeals in *Gerico Investment Company* v. *FCC,* U.S. App. D.C. , decided January 17, 1957. The Court, in affirming the Commission, followed its earlier decision in *Coastal Bend*

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[1] As an alternative to complete UHF deintermixture of the market, Gerico also proposed that the Commission "partially" deintermix Miami by leaving the existing, pre-freeze VHF station, Channel 4, untouched, but deleting the remaining VHF assignments.

v. *FCC*, 231 F2d 498, holding that it was not an abuse of discretion for the Commission to continue to make authorizations for VHF channels assigned under a valid and subsisting rule while considering changes in its rule making policies in another proceeding.

6. In the meantime, the Commission had commenced the proceedings in Docket 11532, looking toward revisions in its overall allocations policies. In this connection, Gerico's request for partial deintermixture of the Miami area on a UHF basis had been "denied" for the time being, subject to the outcome of the matters under consideration in Docket 11532 and the policies which might thereby be formulated.

7. In June, 1956, the Commission terminated the proceedings in Docket 11532 and reversed its prior policy of intermixing VHF and UHF allocations. It thereupon instituted a series of "remedial" rule-making proceedings in an effort to undo, so far as possible, the havoc created by its earlier allocations under the policies created in the Sixth Report and Order, and, meanwhile, took other steps to produce information, research and development which could lead to a complete revision of all allocations for commercial television on a nationwide basis.

8. By June, 1956, the Commission had authorized operation of a station on Channel 7 in Miami, and was nearing the conclusion of its deliberations with respect to Channel 10. However, in denying, earlier, the requests to "stay" its proceedings in the VHF comparative proceedings in Miami and elsewhere, pending the outcome of the various individual rule-making proposals, and, later, of the outcome of Docket 11532, the Commission had vigorously asserted that nothing it did in its adjudicatory proceedings could or would affect its ultimate decision to corner the VHF-UHF structure in any given market, should such a course be found desirable as a result of the general rule-making proceedings being conducted in Docket

11532. The Commission clearly indicated that, with respect to its VHF authorizations, the entire situation was in a state of flux and that it had no intention of binding itself to a specific course of action because of its interim decisions, if any, in the various adjudicatory proceedings in the areas affected. The essential rule-making question, whether to make the Miami area VHF or UHF, was then still open.

9. In concluding the proceedings in Docket 11532, the Commission proposed to undo the UHF-VHF dilemma in Miami by tentatively proposing to allocate an additional VHF channel to the area, a proposition considered "more meritorious than deletion of two or all VHF channels from Miami, as some petitioners and parties to this proceeding have proposed." It thereupon invited comments, in Docket 11756, to a proposal to add Channel 6 to Miami. Among the factors to be considered, however, was "whether the addition of a new VHF assignment would be consistent with the objective of improving opportunities for effective competition among a greater number of stations." Of course, the Commission's proposal to deintermix Miami on a VHF basis was no more final at this point than were its various proposals to deintermix other markets on a UHF basis. Each proposal required the formality of rule-making proceedings and critical examination in the light of the Commission's new policy leading toward the elimination or assignment of VHF facilities in order to accomplish "more effective competition among a greater number of stations," and thus finally to achieve, insofar as now possible, the design of the Sixth Report and Order which had been so hopelessly frustrated by the Commission's earlier insistence on *intermixture* as a fundamental policy of allocations. Meanwhile the Commission's adjudicatory proceeding with respect to the one remaining VHF channel in Miami continued apace.

10. After Comments were filed by a number of parties, the Commission, on April 29, 1957, issued its final Report

and Order in Docket 11756 assigning Channel 6 to Miami. It is unnecessary to review in detail the substance of the matters which were presented to the Commission for consideration in this proceeding, for, insofar as the present Motion is concerned, it is the *fait accompli* which is of importance. It may be observed in passing, however, that Gerico's Comments, which were based upon an exhaustive analysis of the airspace limitations in the area which the antenna for any station serving Miami on Channel 6 must be located, and the acute 307(b) factors raised by the proceeding, sufficiently suggested to the Commission that the proposal involved would not, in fact or law, be "consistent with the objective of improving the opportunities for effective competition among a greater number of stations."

11. Three questions, in reality, were resolved by the Commission's Decision of April 29, 1957, concluding the Miami, Channel 6 proceeding. As noted above, the proposed rule making in Docket 11756 required, by its own terms, a decision based upon the Commission's new allocations policy and whether Miami was to become VHF or UHF was, therefore, a question which could only be resolved upon the record of this proceeding. In addition, the Commission, earlier, had specifically disclaimed that its contemporaneous processing of the competitive applications for VHF allocations in the Miami area and elsewhere would in any way affect its decisions in its rule-making proceedings. Indeed, were it otherwise, it may reasonably be stated that the Commission's position with respect to the issuance of "stay" orders in the adjudicatory proceedings could not have been sustained by the Court of Appeals in the light of the *Ashbacker* doctrine. By its Order of April 29, 1957, the Commission decided (1) to continue with its VHF authorizations, thus making of Miami a tight little VHF island; (2) to allocate an additional VHF channel to replace the "available" UHF service which would be lost as a result of permitting the operation of three commercial VHF stations in Miami;

and, (3) to proceed in Miami by means of VHF rather than UHF deintermixture, thereby rejecting, finally, the alternative solution to the Miami problem which would have led to the deintermixture of the market on a UHF basis. The Commission stated, in its Order in Docket 11756:

> "Our experience in other markets convinces us that the advent of a third VHF station in a market such as Miami would, in all probability, destroy the ability of the two existing UHF stations in the area to continue to provide service and eliminate the potentiality for other UHF stations on the UHF channels allocated to the area, as well as the possibility of more effective competition among a greater number of stations."

thus clearly indicating that its decision involved not merely the addition of a channel to compensate for the loss of a presently existing service, but included the decision to continue with the present VHF authorizations, as such. In any event, inasmuch as the Miami area involved the presently pending failure of the intermixture policy of the Sixth Report and Order, the Commission would necessarily have been faced, had it decided that the addition of a fourth VHF channel would not have met the new policy set forth in Docket 11532, with the next question of whether to permit the existing allocations to remain unchanged or whether to proceed to deintermix the market on a UHF basis. Either decision would have resulted in deintermixture; the first on a VHF basis, without the saving virtue of a compensating VHF channel; the second on a UHF basis with the opportunity for virtually unlimited competition among stations.

12. Stripped of all of its unessential and complicating ingredients, the Order of the Commission of April 29, 1957, answered the simple question, whether to dispose of UHF service in the Miami area.

13. By deciding to adopt the VHF route, the Commission effectively and purposefully deleted UHF service in Miami. The decision was made in the full knowledge that such a result would be forthcoming. At the same time, the Commission proposed to "offset this loss in available service(s)" by adding a new VHF channel. WITV is now, and was, at the time the decision was issued, the only existing "available" UHF service in the area.

14. By deciding to adopt the VHF route, the Commission also modified WITV's license as the sole existing UHF station in the market to precisely the same extent and effect as it proposed to modify the licenses of the existing *VHF* stations in Evansville, Fresno and Schenectady. Of course, it was not necessary, technically, physically to expunge the UHF channels from the Table of Assignments in Miami, or Norfolk, or New Orleans, in order to accomplish the identical result sought to be reached in Evansville, Fresno or Schenectady, the deletion of a class of service. It was only necessary for the Commission to decide to proceed with the assignment and authorization of additional VHF channels. *The intermixture question, however, was the same in each of the afore-mentioned proceedings.* At no time, however, in connection with the Miami proceeding, after deciding to eliminate UHF service in the market, did the Commission comply with the compulsory requirements of Section 316 of the Communications Act of 1934, as amended.

15. Inasmuch as VHF occupies the favored competitive position in every market and VHF saturation inevitably leads to the destruction of UHF service, the procedures set up by the Commission in the *UHF* deintermixture proceedings requiring the actual deletion of the VHF channels from the Table of Assignments and the issuance of show cause orders under Section 316 of the Act in connection with the acknowledged modifications of licenses or permits involved, unfairly and unjustly favors the VHF

licensees of the Commission as opposed to the UHF licensees whose authorizations are, nevertheless, as effectively modified by *VHF* deintermixture proceedings, but *without* such overt benefits. It is unfortunate, in itself, that the UHF fraternity is subject to discriminatory trade practices on every hand. It would be doubly unfortunate were the UHF licensees to be the subject of discriminatory practices by the Federal Communications Commission.

16. Furthermore, in each of the *UHF* deintermixture proceedings, the Commission has provided a substitute channel to each of the licensees involved (*cf.* proceedings relating to Evansville, Fresno, Peoria, Springfield and Schenectady). And, where no conditional grant was involved (*i.e.*, Evansville, Fresno and Schenectady) the Commission has uniformly required that the licensee involved "show cause" why it should not operate on the substituted channel. By analogy, it is clear that the Commission should have required, in the Miami VHF deintermixture proceeding, that WITV "show cause" why its license should not be modified to specify Channel 6, Miami, where such a channel was available and specifically allocated to replace the "available" UHF service to be lost as a result of the Commission's decision. Of course, had such a "substitute" channel been unavailable, Section 316 of the Act would still have applied, but only to the extent that it would have been necessary for the Commission to carry the burden of showing that the service in question should be deleted in its entirety.

17. In short, the Commission has decided to delete UHF service in the Miami area in favor of VHF saturation. It has also decided to allocate a VHF channel to "offset this loss in available service(s)" by assigning Channel 6 to Miami. WITV is the only existing UHF service "available" in the entire area. Its assignment has been deleted as a result of the Commission's action.

It is entitled, as a matter of right, to the channel allocated to replace it as a UHF service. Unless it cares to create a double standard of allocations procedures for VHF and UHF licensees, the Commission should now issue to WITV a modified license to comport with the action previously taken. Of course, this request is not made in an adversary proceeding, nor is it inimical to any policy or procedural requirements heretofore adopted by the Commission. In substance, WITV merely requests the Commission to issue to it a license to conform to accomplished administrative action.

18. Gerico hereby waives its rights to a show cause proceeding under Section 316 of the Act provided, however, that the Commission issue to Gerico a modified license specifying operation on Channel 6, Miami, subject, of course, to the filing by Gerico of appropriate engineering information to comply with the technical specifications required. In the event that the Commission should decide, for some reason, that WITV is not entitled to Channel 6, WITV hereby requests that the Commission forthwith proceed with the statutory proceeding required by Section 316 of the Act. In this connection, it should be noted that such a proceeding could not be conducted in a vacuum and that it would be necessary to consolidate the show cause action with the pending comparative proceedings for both Channels 7 and 10, since the right of WITV to retain its license is not abstract but legally related to the question of whether the WITV service should be deleted in favor of service from Channels 7 and 10. Of course, these questions will all be avoided if the Commission grants the primary relief herein requested.

19. It is respectfully requested that the Commission give early consideration to this matter in order that service on the new channel may be commenced without delay. In this connection it is noted that ABC is in the process of searching for a VHF affiliate and that it is quite possible

that the NBC affiliation may become available to television stations in the area, should the Commission promptly implement the mandate of the Court of Appeals in *Sunbeam Television* v. *FCC*, - U.S. App. D.C. , decided March 18, 1957. WITV's ability to compete for the available network affiliations is presently seriously impaired due to the lack of assurance from the Commission that it is now entitled to operate on Channel 6. Additionally, early consideration of this matter will forestall the possible expenditure of time and money by persons who may otherwise attempt to apply for Channel 6.

WHEREFORE, THE PREMISES CONSIDERED, Gerico Investment Company respectfully requests that the Commission issue to it a modified license specifying operation on Channel 6, Miami, Florida, subject, of course, to the filing by WITV thereafter of such information returns as may be necessary to provide the Commission with the technical information required to authorize such operation. In the event that the Commission denies, for any reason, WITV's request for its modified license, it is hereby requested that the Commission forthwith initiate the Section 316 proceeding required by law, consolidating such proceeding with the comparative proceedings relating to Channels 7 and 10 in Miami.

Respectfully submitted,

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May 29, 1957